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Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM 1988

LO SHIPPERS ACTION COMMITTEE

Petitioner

vs.

INTERSTATE COMMERCE COMMISSION, Et Al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, when a complaint has been filed with the Interstate Commerce Commission (ICC) alleging that allowances paid by railroads to private rail car owners for the use of their cars are not in conformity with 49 U.S.C. §11122(b), the Commission has discretion to regulate or not to regulate such allowances as it sees fit?

2. Whether §11122(b), may, during a period of car surplus, be construed so as to permit railroads to impose on unwilling shippers allowances below the cost of owning and maintaining such cars?*

3. Whether, when the existing allowances have been shown to be below the cost-of-ownership standard of §11122(b),

* Unless otherwise indicated, all statutory references are to 49 U.S.C.

the ICC, by declining to prescribe just and reasonable allowances for the future, can effect de facto deregulation of such allowances without following the exemption procedures required by 49 U.S.C. §10505?

LIST OF PARTIES

The following were parties to the proceeding in the Court of Appeals:

Lo Shippers Action Committee (LOSAC),
Petitioner.

LOSAC is an unincorporated non-profit association formed for the purpose of securing just and reasonable compensation for the use by the railroads of privately-owned covered hopper cars (classified by the Association of American Railroad for mechanical purposes as type "LO" cars). The members of LOSAC are listed below.

The Interstate Commerce Commission
The United States of America,
Respondents.

U.S. Clay Producers Traffic Association, Inc.,
Intervenor in Support of Petitioner.

Association of American Railroads
Consolidated Rail Corporation,
Intervenors in Support of Respondents.

Itel Rail Corporation,
Amicus Curiae.

LIST OF CURRENT MEMBERS OF LO SHIPPERS ACTION COMMITTEE

A. E. Staley Manufacturing Company
Agrico Chemical Company
American Grain and Related Industries
Allied/Signal Corporation
American Colloid Company
American Cyanamid Company
Amoco Chemicals Corporation
Archer Daniels Midland Company
Badische Corporation
Bay State Milling Company
Benson-Quinn Company
Blue Circle Atlantic Co.
Borden Chemical Division of Borden, Inc.
Bunge Corporation
Carborundum Electro-Minerals Co.
Cargill Incorporated
Carlon Electrical Services, Inc.
John S. Carlson & Co., Inc.
Central Soya Company, Inc.
CertainTeed Corporation
CF Industries, Inc.
Chevron Chemical Co.
Chevron, U.S.A.
Chicago Freight Car Leasing Co.
Church & Dwight Co., Inc.
Climax Chemical
Con Agra, Inc.

LIST OF MEMBERS (Cont.)

Continental Polymers
CPC North America – Division of CPC International
Diamond Crystal Salt Company
Dixie Portland Flour Mills, Inc.
The Dow Chemical Company
E.C.C. America, Inc.
E. I. du Pont de Nemours & Co.
Eagle-Picher Industries, Inc.
Englehard Minerals & Chemicals Division
ERCO, a Division of Tenneco Canada, Inc.
Exxon Chemical Americas
Farmland Industries, Inc.
FMC Corporation
Fina Oil & Chemical Company
First Mississippi Corporation
Foote Mineral Company
Gardinier, Inc.
Garvey Elevators, Inc.
General Chemical Corporation
Georgia Gulf Corporation
Georgia Kaolin Company
Gold Kist, Inc.
B. F. Goodrich Chemical Group
Great Lakes Carbon Corporation
Harvest States Cooperatives
Helm Financial Corporation
Holly Sugar Corporation
Honeymead Products Co.

LIST OF MEMBERS (Cont.)

The Hubinger Company
ICI Americas, Inc.
International Minerals & Chemical Corporation
International Multifoods Corporation
ITT Continental Baking Company, Inc.
J.M. Huber Corporation
Kerr-McGee Chemical Corporation
Lauhoff Grain Company
Louis Dreyfus Corporation
Manville Sales Corporation
Merchants Investment Co.
Mile High Railcar
Monsanto Company
Morton Thiokal, Inc.
National Starch and Chemical Corporation
North Dakota Mill & Elevator Company
Northbrook Corporation
Novacor Chemicals, Ltd.
Occidental Chemical Corporation
Olin Corporation
Ozark-Mahoning Company
Penick & Ford, Ltd.
Phillips 66 Company
The Pillsbury Company
Potash Company of America
The PQ Corporation
Rail-Lease Inc.
Royster Company

LIST OF MEMBERS (Cont.)

J. R. Short Milling Company
Sohio Electro Minerals Co.
Soltex Polymer Corporation
Stauffer Chemical Company
Temco Corporation
Tennessee Eastman Company
Texasgulf Chemicals Co.
Thatcher Glass Corporation
Union Carbide Corporation
Union Equity Co-Operative Exchange
U.S. Borox & Chemical Corporation
Witco Chemical Corp.
Zip Transportation Co., Inc.

Associate Members

ACF Industries, Inc.
General American Transportation Company
General Electric Railcar Services Corporation
Itel Rail Corporation
Pullman Leasing Company
Union Tank Car Company

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REPORTS AND OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in Appendix A hereto. It is reported as *LO Shippers Action Committee v. Interstate Commerce Commission*, 857 F.2d 802 (d.c.cIR. 1988).

The decision and order of the ICC is reported as *LO Shippers v. Aberdeen & Rockfish Ry. Co. Et Al.*, 4 I.C.C.2d 1 (1987). It is reproduced in Appendix B hereto.

GROUNDS FOR JURISDICTION

The opinion of the Court of Appeals was filed September 23, 1988. A petition for rehearing and suggestion for rehearing en banc were timely filed on November 4, 1988. Both

petitions were denied on November 18, 1988. A copy of the Court's Order denying LOSAC's petition for rehearing is reproduced in Appendix E hereto.

This Court's jurisdiction to review the judgment of the Court of Appeals on certiorari is found in 28 U.S.C. §§1254(a) and 2101(c).

The jurisdiction of the Court of Appeals is found in 28 U.S.C. §§2321 and 2342(5).

STATUTES INVOLVED

The statutes involved are set forth in Appendix C hereto. Appendix D hereto contains the complete legislative development of 49 U.S.C. §11122.

STATEMENT OF THE CASE

As common carriers, railroads must provide all of the services and instrumentalities required to handle the cargoes they hold themselves out to carry. In the case of liquid and dry bulk cargoes, that obligation has been met in whole or in large part by the use of private cars furnished by the shipper for which he receives compensation in the form of a mileage "allowance" published either in the national mileage tariff, known as Mileage Tariff PHJ 6007, or in an individual railroad's tariff.

Private rail cars (i.e., cars of non-railroad ownership) have always composed a significant portion of the national rail car fleet, but never more so than today. In 1929, for example, out

of a total of 2,210,662 rail cars in service, 286,979, or about 13 percent, were owned by non-railroads. AAR, *Railroad Facts* (1988 ed.) 46. At the end of 1987, out of a total of 1,288,129 rail cars in service, shippers and private car companies owned 432,383, or approximately 37 percent. Id. At the end of 1987, roughly 45 percent (127,344) of the entire national covered hopper car fleet was privately owned and 99 percent of all tank cars was privately owned. Id. LOSAC's members own approximately 40,000 covered hopper cars, comprising nearly 14 percent of the total covered hopper car fleet.

A group of shippers, some of whom in the 1960's helped develop the covered hopper car as an alternative to the less secure and efficient boxcar, formed LOSAC in the early 1970's to secure equitable compensation for the railroads' use of their cars. Almost from its inception, LOSAC was either in litigation or negotiation with the nation's railroads concerning proper levels of compensation for the use of their cars by the railroads. These efforts culminated in an agreement, in 1980, between LOSAC and all of the nation's major rail carriers pursuant to which the parties established allowances which fairly reflected the actual costs of owning and maintaining covered hopper cars.

Later in 1980, the Congress enacted the Staggers Rail Act (Pub. L. 96-448; 94 Stat. 1895, Oct. 14, 1980), which ushered in significant regulatory reforms for the railroads, most significantly in the area of rail freight rates. Also in 1980, there developed a surplus of covered hopper cars, growing out of the recession and the Russian grain embargo imposed by the Carter administration.

In response to these events, the railroads, in May of 1982, informed LOSAC's members that they would not implement cost updates for allowances under the 1980 agreement, as they had agreed to do. Concurrently, individual railroads began unilaterally capping allowances, mainly on shipments of grain and grain products, at compensation levels significantly below those which the railroads had only recently agreed with LOSAC's members fairly reflected the actual cost of owning and maintaining covered hopper cars.[1]

LOSAC responded to these allowance caps in several ways, all designed to obtain a definitive ruling on the meaning of §11122(b) in order to end the continuing controversies over allowances at the earliest possible time. LOSAC filed with the ICC, on February 24, 1983, a formal complaint (Dkt. No. 39117) alleging that the allowances imposed on shippers by the railroads were unlawful under the cost-of-ownership standard of §11122(b) and other sections of the Act. This is the case here on review. LOSAC asked the ICC to find the allowances then in effect unlawful, to order the railroads to cease and desist from violations of the Act, to prescribe just and reasonable allowances for the future, and to award LOSAC's members damages for past violations. LOSAC showed that the assailed allowances were substantially below the private car owners' costs of ownership.

LOSAC also filed protests at the Commission against a number of mileage allowance caps filed by individual railroads. One such case, Docket No. 39908, *Mileage Allowances For Covered Hoppers, Grain & Grain Products, BN* (not

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1 This standard of compensation is known as cost of ownership, as that phrase is defined in §11122(b).

printed), served December 5, 1985, resulted in an order requiring the Burlington Northern Railroad to cancel a tariff capping allowances at 10 cents, far below levels reflecting cost of ownership. This, however, did not solve the problem because the Commission permitted allowances of 15 and 18 cents per mile, themselves still far below cost of ownership, to retake effect. LOSAC appealed that decision to the United States Court of Appeals for the D.C. Circuit, seeking a definitive ruling on the meaning and effect of §11122(b). The court, in *LO Shippers Action Committee v. Interstate Commerce Commission*, 808 F.2d 64 (D.C. Cir. 1986), held that LOSAC, having won the case, lacked standing to appeal. The court noted in its decision (Id. at 66) that –

> the "cost of ownership" question that LOSAC seeks to litigate here is currently before the Commission in what has been described as an "industry-wide" proceeding. We will not preempt an appropriate administrative determination on that issue by deciding this case.[2]

Because LOSAC regarded the statutory construction issue as the crucial issue in all the controversies over allowances, it also sought to obtain from a federal district court a declaratory order construing the meaning and effect of §11122(b). On April 6, 1984, LOSAC filed suit in the U.S. District Court for the Northern District of Illinois, Eastern Division, naming the individual commissioners of the Interstate Commerce Commission and the Association of American Railroads as defendants and seeking a declaratory order construing §11122(b). In a Report and Recommenda-

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2 The "industry-wide" proceeding referred to was ICC Docket No. 39117, the case here involved.

tion by Magistrate Lefkow (*LO Shippers Action Committee v. Reese H. Taylor, Jr., Et Al.*, No. 84 C 3034, slip op. (N.D. Ill. E.D. Sept. 3, 1986)), the magistrate recommended dismissal on grounds of primary jurisdiction in the ICC, particularly in view of the pendency of LOSAC's complaint case (Dkt. No. 39117) at the Commission. Since, by that time, LOSAC's complaint case at the ICC had already been briefed, LOSAC voluntarily dismissed its declaratory judgment action.

LOSAC's complaint case (Appendix B) at the Commission was decided on two grounds. First, the Commission held that, under §11122(a), it has discretion whether or not to prescribe allowances at all, and on that basis, declined to prescribe covered hopper allowances for the future. Appendix B at 14-18. Second, it held that §11122(b) does not require allowances to be based on cost of ownership, saying (Id. at 21):

> Under prevailing market conditions, reductions below full cost-of-ownership allowance levels have been justified by considerations of excessive fleet size and the need to maximize car use. In fact, the record in this case shows that *allowing market based car hire returns*, instead of prescribing fixed returns, *best accommodates the various factors we are required by the statute to consider*. (Emphasis added.)

The court of appeals affirmed both of the Commission's main holdings. First, the court placed full reliance on the word "may" in §11122(a) and held (Appendix A at 10) that –

> [T]he Commission's determination that it was not required to prescribe compensation levels was

within its statutory discretion, and we will not disturb that determination.

On the fundamental issue in the case – the interrelationship between the first and second sentences of §11122(b), and the consequent meaning and effect of that section as regards a private car compensation standard – the court deferred to the Commission's construction of §11122(b), approving it without any real scrutiny. The court, like the Commission before it, did not give any consideration to the governing legislative history or the predecessor versions of §11122(b), from 1966, when the cost of ownership standard was first written into the Act, or from 1976, when the standard was strengthened and expanded. It relied solely on the wording of the 1978 "revised" version of the statute. Nor did the court even acknowledge arguments by LOSAC showing that, in 1980, when the Staggers Act was enacted, Congress expressly rejected legislative proposals for market-based private car compensation.

REASONS FOR GRANTING THE WRIT

I. THE CONSTRUCTION OF §11122(a) AND (b) INVOLVES IMPORTANT ISSUES OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

In the decision under review, the United States Court of Appeals for the District of Columbia Circuit affirmed a decision of the Interstate Commerce Commission which fundamentally affected the long-established standard of compensation for private parties – shippers and other private car owners – who supply cars for railroad use, chang-

ing the standard from that of the car owner's cost of owning and maintaining the car to one set wholly by market forces, without regard to cost of ownership. The decision – in a case which the participants all conceded had industry-wide significance – will have enormous impact on the supply of cars available to the nation's railroads. In the short term, it will mean that hundreds of private car owners will be undercompensated each year for their investment in rail equipment to the extent of hundreds of millions of dollars. In the long term, it will mean that private investment in rail cars will dwindle and that severe rail car shortages – of the sort that first drove Congress in the mid-1960's to specifically legislate the cost-of-ownership standard for car compensation – will once again plague our nation. Large-scale rail car shortages affect everyone. Rail car shortages hamper efforts of American farmers, manufacturers and merchants to promptly and efficiently transport basic materials and finished products, with resultant harmful effects on our domestic economy and upon our ability to export goods, to compete in world markets and to reverse our nation's trade deficit. Equally serious, rail car shortages dangerously reduce our defense-readiness.

The basic issue raised by these proceedings is, what is the standard for private rail car compensation under §11122(b) of the Act? Since the very beginning of the railroads' use of private rail cars in this country to fulfill their common carrier obligation, that standard has been "cost of ownership." *Mileage Allowances on Refrigerator Cars*, 218 I.C.C. 359, 364 (1936); *Dixie Carriers, Inc., Rates And Allowances*, 278 I.C.C., 417, 423 (1950); *Tank Car Allowances In Official Territory*, 313 I.C.C. 435, 438 (1961). In the decision here under review, the Commission, with the Court of Appeals' approval, has

abandoned the cost-of-ownership standard for car compensation in favor of market-based compensation.[3]

This has serious ramifications for the national interest. The Commission has itself recently recognized that "[f]reight car shortages have been the rule, and car surpluses the exception, for much of the history of railroading in the United States." *Investigation Of Adequacy Of Freight Car Ownership*, 1 I.C.C. 2d 700, 703 (1985). Moreover, the Commission acknowledges that "[h]istory teaches that car shortages are far more common than car surpluses, and we cannot properly allow periodic swinges in equipment availability to dictate the answers to long-range policy questions." Id. at 712. Nonetheless, the Commission has allowed the now-ending car shortage to dictate a fundamental change in the law of car compensation which will have gravely adverse long-range consequences for the nation's rail car supply. Since the same compensation standard applies equally to all private cars, the effect of the Commission's decision in *LOSAC* is to usher in market-based compensation for all private cars. This change is clearly contrary to the intent of Congress set forth in the statute.

The burgeoning reliance of the railroads upon private cars is unmistakable. Since 1929, private ownership of rail cars has grown from 13 to 37 percent of the total national fleet. A disproportionately large share of cars – most notably, covered hoppers and tank cars – used for carrying bulk

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3 Actually, "market-based compensation" is a misnomer. The railroads control the market. They control the tariff-publication mechanism and they have complete control over access to the market. No private cars may be used without railroad approval. Thus, "market-based compensation," as used by the ICC, means allowances unilaterally imposed by the railroads.

materials is in private ownership. As previously noted, 45 percent of the covered hopper fleet is private and 99 percent of the tank car fleet is private. AAR, *Railroad Facts* (1988 ed.) 47. The obvious inference is that the railroads are not investing in sufficient equipment to meet the national needs and that they are increasingly reliant on private equipment to fulfill their common carrier obligation.[4]

It is questionable transportation policy, to say the least, for the Commission to sanction in below-cost allowances, at a time when railroad reliance upon private cars is greater than ever. The Commission has repeatedly recognized that allowances which are below the cost-of-ownership level are a "disincentive to the purchase of cars" and, hence, are contrary to the congressional purpose underlying §11122. *See Car Service Compensation – Basic Per Diem Charges*, 361 I.C.C. 189, 191 (1979), aff'd in part, rev'd in part on other grounds *Consolidated Rail Corp. v. United States*, 619 F.2d 988 (3d Cir. 1980); *Car Service Compensation – Basic Per Diem Charges*, 358 I.C.C. 716, 737 and 738 (1977).

If market-based allowances force a reduction in private investment in rail cars, the inevitable effect will be severe rail car shortages. The cost of replacing the private rail car fleet would be too high for the railroads to bear alone and the nation would again face severe car shortages of the sort which led to remedial federal legislation in 1966 and 1976.[5]

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4 In the *LOSAC* decision, the Commission observed that the covered hopper car surplus had decreased and spot shortages were occurring in the west. Appendix B at 11, n. 17.

5 Assuming the average replacement cost of a covered hopper car to be $40,000, it would cost over five billion dollars just to replace the private covered hopper fleet, to say nothing of other car types.

This case clearly presents a legal issue of widespread effect and great importance as to the meaning and effect of §11122(b). The Court below simply deferred to the ICC's interpretation of its own powers. The Court conducted no meaningful review of the issues, never referred to the statute "replaced" by the "revised" version, and never referred to the legislative history cited to it by petitioner, which clearly showed that Congress has specifically provided that allowances shall be based on costs of ownership and that the ICC is not authorized to vary that standard.

There are no other cases of such industry-wide significance pending or likely to occur wherein the issue is so clearly presented. The issue needs to be definitively decided by this Court, given the national importance of the matter as well as the adverse consequences that would result if the Court of Appeals' decision is let stand.

II. THE DECISION OF THE COURT OF APPEALS IS PATENTLY ERRONEOUS

A. There Is No Way §11122(b) Can Be Construed To Require Shippers To Accept Allowances Below Cost of Ownership, Even In Times Of A Car Surplus.

While the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), may not always be easy to apply, they certainly are in this case. Simply following those principles leads inevitably to the conclusion that Congress has spoken clearly and unambiguously to the precise issue involved and has said in no uncertain terms that the floor for private car allowances shall be the basic costs of ownership, whether there is a car shortage, car surplus or merely an adequate car supply. Owners are to be

"compensated" at all times for furnishing private cars. Furthermore, the ordinary rules of statutory construction, from which the Court of Appeals departed, are "especially forceful" where Congress itself has defined the specific standard to be used. *American Min. Congress v. U.S. E.P.A.*, 824 F.2d 1177, 1183 (D.C. Cir. 1987).

And in this case, a special rule of statutory construction applies. Congress itself has said that a provision of the 1978 revised Interstate Commerce Act cannot be construed as making a "substantive" change in the meaning of a "replaced" provision. (Appendix C at 5) When a question of Congressional intent is at issue, as it is here, reference must be made to the statute "replaced" to determine that intent. The court cannot determine Congress' intent from the revisers' language alone. Two courts have specifically recognized the necessity of reviewing pre-1978-revision versions of the Interstate Commerce Act to determine congressional intent for enactments made before 1978. See *Atchison, T. & S. F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980); *Trailer Marine Transport Corp. v. Federal Maritime Commission*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979). Also, as the Second Circuit has held, and as common sense itself would dictate, a particularly important aid to statutory construction is the wording of prior versions of the statute. *Israel-British Bank (London) Ltd. v. Fed. Dep. Ins. Corp.*, 536 F.2d 509, 512 (2d Cir. 1976), cert. den., 429 U.S. 978.

Obviously, a statute which plainly states, "[t]he rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car," is not silent on how the rate of compensation is to be determined. The Court of Appeals purported to find (Appendix A at 12) some "gap" between the first and

second sentences of §11122(b) based solely on a superficial reading of §11122(b) as it appears in the codifiers' "revised" version, but there is no such gap in the statue as actually enacted by Congress.

The statutory provisions on which this case turns were originally enacted in 1966. Infra at 14; Appendix C at 1-2; Appendix D at 3-4. After directing the ICC to give consideration to "the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply," Congress further directed that the ICC —

> . . . shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by [an] incentive element or elements . . . (Emphasis added)

That language means just what it says. The 1976 amendments contained the same provisions with the addition of a specific statement of Congressional policy which tied it all together. See Appendix C at 3-4. There is simply no way this language can be interpreted as the Court below interpreted the "revised" language.

A statutory provision cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent. *United States v. Champlin Refining Co.*, 341 U.S. 290 (1951). Rather, the meaning of the statute should be considered in the light of the national conditions existing at the time and from which

the statute emerged. *The Pietro Campanella*, 73 F. Supp. 18, 26 (S.D. Tex. 1947).

The Court of Appeals, and the Commission before it, gave no consideration to the legislative history of §11122(b) as originally enacted in 1966.[6] This omission led to construction of the statute in a factual void. The original predecessor of §11122(b) was enacted in 1966 "to secure alleviation of the recurring national shortages of railroad freight cars."[7] That congressional purpose has been recognized repeatedly by the Commission and the courts. See *Consolidated Rail Corp. v. United States*, 619 F.2d 988, 992 (3rd Cir. 1980); *Car Service Compensation – Basic Per Diem Charges*, 358 I.C.C. 716, 721 (1977); *Long Island R. Co. v. United States*, 318 F. Supp. 490, 492 (E.D.N.Y. 1970); *Union Pacific R. Co. v. United States*, 300 F. Supp. 318, 325 (D. Neb. 1969), aff'd, 396 U.S. 27, reh. denied, 396 U.S. 1030 (1969).

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6 Neither the ICC nor the Court of Appeals even referred to any of the legislative history referred to in this petition. In fact, neither the ICC nor the Court even acknowledged that LOSAC had strongly argued this point.

7 H.R. Rep No. 1183, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 2228. This is not to say that §1(14)(a) first appeared in 1966, or that there was no car compensation provision in the Act prior to 1966. Although the earliest car compensation statute came into being in 1917, and was amended in 1920, 1935 and 1940, these first four versions did not contain any reference to a standard of car compensation. That first appeared in 1966.

The manner in which Congress effected the purpose of the statute in the 1966 amendment was to put the cost-of-ownership standard in the statute and then, in addition, to expressly empower the Commission to raise rates of car compensation above cost of ownership, including a fair return on value, through imposition of an incentive element in order to encourage acquisition of specific car types.[8]

The legislative history of the 1966 amendment leaves no doubt that cost of ownership was the minimum permissible car compensation; it was a starting point. In a letter reproduced in the House report accompanying the 1966 amendments, the Acting Chairman of the ICC Committee on Legislation conveyed the Commission's strong support of the measure and stated that the proposed statute would make clear "that the Commission has authority to establish per diem charges above the bare cost of ownership and at a

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8 The immediate administrative background for the amendment of §1(14)(a) was that, in *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659, decided July 25, 1947, the Commission established an incentive per diem charge for railroad-owned cars other than tank and refrigerator cars to be applicable for six months to "promote greater efficiency in the use and increase the supply of cars." (Id. at 674) That order was set aside in *Palmer v. United States*, 75 F. Supp. 63, 75 (D. D.C. 1947) on grounds that "the statutory authority to fix reasonable compensation for the use of cars does not empower the Commission to establish, solely for general car-service regulatory purposes, rentals in excess of any purported reasonable recompense to the owner." The amendment to section 1(14)(a) was Congress' response to the judicially-imposed restriction on the Commission's power to fix car compensation above cost of ownership. 112 Cong. Rec. H10439, daily ed. May 12, 1966 (Comments of Congressman Brock Adams, member of the Interstate and Foreign Commerce Committee).

level that would make the advantages of owning equipment more attractive."[9] (Emphasis added)

Numerous statements of legislators during the floor debates for the 1966 amendments dealing with car compensation demonstrate that "barebone cost of ownership" was the floor for car compensation:[10]

The Staggers Act repealed subsection 11122(b)(2) and eliminated the (1) from §11122(b)(1), but it left the text of §11122(b)(1) unchanged as §11122(b). While the legislative history of that statutory change is meager, the Congressional debates make it clear that repeal of §11122(b)(2) was not intended to change existing law requiring allowances to be based on cost of ownership because, under §11122(b), formerly §11122(b)(1), the Commission still retained the power to accomplish, by giving consideration to current costs of capital, what it formerly could accomplish by including an incentive element in basic car hire rates.[11]

In the final debate immediately before passage of the Staggers Act in the Senate, the Chairman of the Committee on

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9 H.R. Rep. No. 1183 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News at 2232 (letter from John W. Bush to Hon. Oren Harris, September 2, 1965).

10 See S. Rep. No. 386, 89th Cong. 1st Sess. 7-8 (June 30, 1965); H.R. Rep. No. 1183, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 2230; 112 Cong. Rec. H10433 (daily ed. May 12, 1966) (statement of Rep. Anderson); 112 Cong. Rec. H10434 (daily ed. May 12, 1966) (statement of Rep. Staggers); 112 Cong. Rec. H10437 (daily ed. May 12, 1966) (statement of Rep. Springer).

11 Also, the Conference Committee Report on the Staggers Act plainly states that "the rental rate for . . . rolling stock should be sufficient to pay an adequate return on investment." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 117 (1980); 126 Cong. Rec. (daily ed. Sept. 29, 1980) H9925.

Interstate and Foreign Commerce, Senator Cannon, said (126 Cong. Rec. S14002 (daily ed. Sept. 30, 1980)):

> Some concern has also been expressed about the bill's car compensation provision. The Conference substitute repeals the specific authority of the Commission to impose what has been known as incentive per diem, that is, an additional incentive element of compensation beyond basic freight car rental charges. On this matter, I wish to make it clear that, in agreeing to elimination of the Commission's authority to impose incentive per diem, the conferees were cognizant of the continued power of the Commission under 49 U.S.C. 11122 to increase basic freight car rental rates to levels high enough to attract new and additional investment into the railroad industry as necessary to assure a national freight car supply adequate to meet the needs of commerce and the national defense. (Emphasis added)

Senator Kassebaum, the minority floor manager of the Staggers Act, echoed those words (Id. at S14011):

> With regard to incentive per diem rates, I want to heartily endorse the chairman's comments on this section, that is, that the repeal of the specific incentive per diem rate authority of the Commission was agreed to in recognition of the fact that continuing authority under section 11122 of the act will serve to preserve necessary flexibility to the Commission in addressing car shortages. (Emphasis added)

Significantly, although Congress has twice amended the 1966 provisions of §1(14)(a), not counting the 1978 revision, it never swerved from its original purpose of maintaining an adequate supply of freight cars and avoiding freight car shortages. Proof of this lies in the fact that throughout all

subsequent changes to §1(14)(a), Congress has retained the statement of purpose which first appeared therein in 1966 that Congress intended to encourage the purchase, acquisition and efficient use of freight cars. That statement of purpose, such as it is after the 1978 revision, now appears in the language of the revisers in §11122(a).[12]

Nowhere in the Statute itself or anywhere in its legislative history is there any indication that Congress ever intended to punish owners or lessees of existing private cars that had been acquired during periods of car shortages by reducing their compensation below costs of ownership during a car surplus. Such a thought would have been abhorrent to Congress. If there had been the lightest indication that such could happen, the whole purpose of requiring adequate or incentive compensation would have been frustrated because no one would have acquired cars with any such possibility hanging over his head.

It is an elementary principal of statutory construction that the words of a statute must be interpreted in light of the purpose Congress sought to serve. *Atchison, T. & S.F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980). A statute should not be interpreted in a manner which would subvert its underlying purpose. *Porter v. Prudential Insurance Co. of America*, 470 F. Supp. 203, 206 (W.D. Tex. 1979). Rather, a statute should always be construed in a manner which effectuates rather than frustrates the major purpose of the legis-

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12 The 1978 revision was supposed to be nothing more than recodification without substantive change. Act of October 17, 1978, §3(a), Pub. L. No. 95-473, 92 Stat. 1337 (1978). See *Atchison, T. & S. F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980). It was at this time that the section number changed from 1(14)(a) to 11122.

lative draftsmen. *Aranda v. Pena*, 413 F. Supp. 849, 850 (S.D. Fla. 1976).

The only construction of §11122(b) that effectuates the purpose of the car compensation provision is one that preserves cost of ownership as the minimum for car compensation. Only such an interpretation will ensure the necessary investment in equipment to guarantee a continuing adequate car supply.[13]

In the deliberations which led to the Staggers Act, the railroads, the Department of Transportation and even the Commission urged Congress to adopt a market-based system for car compensation and Congress specifically rejected that concept, a fact never referred to by either the ICC or the Court of Appeals. This is strong evidence of the error of the Court of Appeals in affirming the Commission's decision to sanction market-based car compensation.

The legislative history of the Staggers Act shows that early drafts of the legislation which became the Staggers Act contained provisions mandating that the marketplace set private car allowances. The earliest version of the Staggers Rail Act was S. 796, proposed by the Carter Administration in 1979. Section 140 of S. 796 would have repealed §11122 entirely and would have also required carriers to individually

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13 Manufacturing rail cars is not like manufacturing paper clips or some other product that can be churned out rapidly on demand. LOSAC submitted evidence to the Commission showing that during past times of heavy demand for cars, manufacturing lead times ran to 1-1/2 to 2 years. C.V.S. 15, p. 5.

negotiate car compensation with each shipper; failing such agreement, the governing car compensation would have been whatever the carriers had jointly established as the "uniform industry wide rates and provisions" for car compensation as between carriers. [14] Transportation Secretary Brock Adams explained that "we simply cannot any longer look to the government to decide . . . what shippers or other railroads should pay for those cars.[15]

A subsequent version of the bill, S. 1946, preserved the cost-of-ownership car-compensation provision of the Act and changed only the Commission's emergency car service powers. See section 301, S. 1946, *Hearings on S. 1946 before the Committee on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 41-42 (November 9, 1979).

This revision brought a strong negative reaction from the Association of American Railroads which, through its president, William H. Dempsey, submitted the following written testimony to the committee:

> The railroads are convinced that car service and compensation matters should cease to be the subject of Federal regulation, and that disputes with respect thereto should be resolved by private arbitration. We realize that this is a radical departure from the status quo and raises uncertainties of concern to shippers, private car owners, car leasing companies and others. We understand, therefore – though we do not agree with – the Committee's considerably narrower approach which is to deal

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14 *Hearings on S. 796 before the Subcommittee on Surface Transportation, Senate Committee on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 48-49 (April 12, 1979).

15 Id. at 73.

> only with the emergency car service powers of the Commission. At the very least, we would urge that the car service and compensation function be made the subject of an in-depth study by the Commission and/or the Department of Transportation as the feasibility and desirability of deregulation.[16]

The earlier car-compensation provision of S. 796 (section 140, deregulating mileage allowances) was revived in another subsequent Administration-backed version of the bill, H.R. 4570 (section 141), but then was removed from the bill during its consideration by the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce (see H.R. 4570, House Subcommittee Preliminary Working Draft No. 2). A DOT Assistant Secretary for Policy and International Affairs expressed the Administration's reaction to this change:

> Similarly, a market oriented approach is, as we maintain, the best way to encourage additional investment in equipment as well as its proper allocation among shippers.[17]

The then Chairman of the Commission, Darius W. Gaskins, Jr., provided the House subcommittee with a section by section analysis of Working Draft No. 2 which dealt with the car service compensation provision of that draft by suggesting ". . . that additional flexibility clearly be provided so

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16 *Hearings on S. 1946 before the Committee on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 152 (November 7, 1979).

17 *Hearings on H.R. 4570 before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 3 (March 31, 1980).

that per diem charges could vary according to particular market conditions."[18]

Ultimately, Congress rejected these appeals for market-based car compensation and retained the cost-of-ownership standard, without change.

This action on the part of Congress conclusively shows that Congress considered and rejected a market-oriented approach to car compensation. In retaining the cost of ownership standard without change, Congress cannot be presumed to have added new meaning to old language, particularly when the new meaning is something that Congress considered but expressly rejected. See *Catano v. Local Board No. 94 Selective Service System*, 298 F. Supp. 1183 (E.D. Pa. 1969).

B. The Court of Appeals' Decision Is In Conflict With *General American T. Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940), and Deprives Petitioner of Remedies Guaranteed It By the Interstate Commerce Act.

In *General American T. Car. Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940), this Court said:

> . . . The shipper in this case was permitted by law to furnish freight cars . . . and to be paid a reasonable allowance . . . and . . . the law requires that the amount and conditions of payment of such allowance shall be set forth in a published tariff. If this is not done, the shipper may complain to the Commission, to the end that a proper allowance be

18 Id. at 290.

> ascertained and made effective by a schedule duly published. (Emphasis added)

This is exactly what LOSAC did after fruitless efforts to negotiate reasonable allowances with the railroads. There is no hint in *El Dorado* that, once a shipper petitions the ICC for a reasonable allowance, the ICC has discretion to regulate or not regulate car compensation as it sees fit. Plainly, §11122(a) simply confers on the ICC the specific power to prescribe allowances[19]; §11122(b) is the standard for exercise of that power. As the ICC itself said in *Mileage Allowances on Refrigerator Cars*, 218 I.C.C. 359, 364 (1936):

> The authority to prescribe the compensation to be paid by a railroad to a car owner for the use of a car owned by the latter carries with it the obligation to determine such compensation in an amount that will be reasonable to the owner.

Obviously, it could not logically be otherwise. It simply makes no sense to say that §11122(b) sets up a legal standard for allowances for private equipment which the ICC or the courts can choose to enforce or not enforce as they see fit. Section 11122(a) cannot be read as conferring that kind of unchecked discretion on the ICC. This Court did not think so in 1940 and today there is a much more specific legislative standard to enforce.

The Commission has no "option" to grant or deny relief to a litigant simply as a matter of its own "untrammeled discretion." *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d

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19 At the time *El Dorado* was decided, §1(14) read substantially as §11122(a) does now. The ICC had already held that compensation for private cars should be based on the cost of ownership, although that standard was not specifically written into the Act until 1966.

1186, 1196 (D.C. Cir. 1985). That the Commission has the duty to enforce the Act is unquestioned. The Commission must act within the ambit of its statutory authority. It must also discharge the duties placed upon it by statute. Section 10321(a) of the Act provides that the Commission "shall carry out" the provisions of the Interstate Commerce Act, of which §11122(b) is a part.[20] Section 10701(b) of the Act entitles a person to file a complaint with the Commission about a violation of the Act. Section 11705(c)(1) of the Act grants to a person the right to file a complaint seeking to enforce the liability of a carrier to that person. And §11122(b) sets up the standard to be used in judging the lawfulness of allowances.

"Shall" is the language of command. *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d 1186, 1191 (D.C. Cir. 1985). When Congress commands, the Commission must listen and act in accordance with the command. It is the duty of the courts "to determine whether the course followed by the Commission is consistent with its mandate from Congress." *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 806 (1973). *Farmers Union Cent. Exch. Inc. v. F.E.R.C.*, 734 F.2d 1486, 1500 (D.C. Cir. 1984). That the Commission does not like the law and prefers allegedly market-based allowances to cost-based allowances is irrelevant. When Congress itself prescribes the standard to be followed the Commission may neither re-write it nor ignore it. *United States v. Carolina Freight Carriers*, 315 U.S. 475, 489 (1942). "It is not the Courts' role . . . to overturn congressional assumptions embedded into the framework of regulation es-

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20 In §12(1), the statute replaced by §10321(a), the ICC was required "to execute and enforce" the provisions of the Act.

tablished by [an] Act." *F.P.C. v. Texaco*, 417 U.S. 380, 400 (1974). Nor is it the Commission's.

C. The Court Of Appeals' Decision Effects De Facto Deregulation Of Covered Hopper Car Allowances, In Violation Of 49 U.S.C. §10505(a)

The Court of Appeals' decision allows market-based compensation to be substituted for cost-based compensation on covered hopper cars.[21] Devoid of the cost-of-ownership framework, and interpreted the way the Commission and the Court of Appeals ruled, §11122(b) contains no standard for car compensation. The practical effect is to exempt covered hopper car allowances from regulation because it takes the meaning out of "reasonableness" as regards allowances. After all, how can any allowance dictated by the market place be unreasonable? This is de facto deregulation of car allowances.

If the objective of the ICC in the proceedings below was to deregulate allowances, as it obviously was, in order properly to have done so, the Commission would have had to follow the procedures prescribed in §10505 and would have had to find that regulation –

> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
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> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

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21 As stated earlier herein (fn. 3, supra, at 8), the term "market-based allowances" is a misnomer, since the railroads control the market.

The Commission never openly treated this as an exemption, or deregulation, matter. Although LOSAC argued before the Commission that, to allow the railroads to set allowances based solely on supply and demand would constitute de facto deregulation of covered hopper car allowances, the Commission never responded to that argument or made any of the findings required of, an exemption petition. The Court of Appeals, similarly, ignored that issue. Accordingly, the Court of Appeals' decision is in error for sanctioning unlawful deregulation of covered hopper car allowances.

CONCLUSION

For the reasons set forth above this Court should issue a Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit to review its judgment in this case.

Respectfully submitted,

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DATED: February 16, 1989

APPENDIX A

LO SHIPPERS ACTION COMMITTEE, Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, and the United States of America, Respondents,

U.S. Clay Producers Traffic Association, Inc., Association of American Railroads, et al., Intervenors.

No. 87-1486.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 28, 1988.

Decided Sept. 23, 1988.

Railroad shippers petitioned for review of Interstate Commerce Commission order declining to regulate railroads' payment of allowances to shippers using their own railroad cars. The Court of Appeals, Sentelle, Circuit Judge, held that Interstate Commerce Commission's refusal to regulate railroad allowances provided to shippers for use of their own railroad cars, thus permitting railroads to pay below-cost compensation to car-providing shippers, was reasonable interpretation of statute authorizing Commission to regulate railroads in order to encourage purchase, acquisition and efficient use of freight cars.

Petition denied.

1. Commerce 160

Court would review Interstate Commerce Commission's published decision rather than transcript of publicly conducted conference, though commissioners voted same way at conference as they did in subsequently published decision,

in that commissioners retained full authority to approve, disapprove, or modify decision until it was published.

2. Commerce 85.8

Interstate Commerce Commission had discretion determining whether to issue regulations providing industry-wide terms for use of nonrailroad-owned equipment. 49 U.S.C.A. §11122(a).

3. Commerce 85.12

Interstate Commerce Commission's refusal to regulate railroad allowances provided to shippers for use of their own railroad cars, thus permitting railroads to pay below-cost compensation to car-providing shippers, was reasonable interpretation of statute authorizing Commission to regulate railroads in order to encourage purchase, acquisition and efficient use of freight cars. 49 U.S.C.A. §11122(a, b).

Petition for Review of An Order of the Interstate Commerce Commission.

Harold E. Spencer, with whom Stephen C. Herman, Chicago, Ill., was on the brief, for petitioner.

Louis Mackall V, Attorney, I.C.C., with whom Robert S. Burke, Gen. Counsel, and Henri F. Rush, Deputy Gen. Counsel, I.C.C., and John J. Powers, III and John P. Fonte, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents.

J. Michael Hemmer, with whom Paul R. Duke, Robert D. Fram, Elizabeth V. Foote, John B. Norton, J. Thomas Tidd, Washington, D.C., John S. Walker, Denver, Colo., Dennis W. Wilson, William R. Power, Robert T. Opal, Chicago, IL., Emried D. Cole, Jr., Paul R. Hitchcock, Paul A. Cunnin-

gham, Richard B. Herzog, Robert G. Shepherd, Jr., Washington, D.C., Michael Roper, Louis P. Warchot, San Francisco, Cal., and Mark A. Kalafut, Omaha, Neb., were on the joint brief, for intervenors The Association of American Railroads, et al. J. Stephen Lawrence, Jr., Washington, D.C., also entered an appearance for intervenors, Ass'n of American Railroads, et al.

Henry M. Wick, Jr., Pittsburgh, Pa., was on the brief for intervenor U.S. Clay Producers Traffic Ass'n, Inc.

Mark L. Evans and James P. Tuite, Washington, D.C., entered appearances for amicus curiae, BRAE Corp. and Itel Rail Corp.

Before MIKVA and SENTELLE, Circuit Judges, and PALMIERI,* Senior District Judge.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge:

LO Shippers Action Committee ("LOSAC") brought a complaint before the Interstate Commerce Commission ("ICC" or "the Commission") against several railroads alleging that the allowances provided to LOSAC's shipper/members for the use of their own railroad cars were inadequate as a matter of law and seeking the establishment of Commission-ordered allowance structures. The ICC dismissed the complaint. LOSAC now petitions this Court for review of that ICC decision. Finding no error, we affirm the agency's dismissal and deny petitioner's request for relief.

* Of the United States District Court for the Southern District of New York, sitting by designation.

I. BACKGROUND

A. *General*

Railroads, as common carriers, generally furnish the cars and equipment necessary to perform the transportation services provided under their tariffs. However, under some circumstances, a shipper provides its own (or a leased) railroad car or a railroad makes use of a car belonging to another carrier. In those cases, the railroad provides compensation to its shipper through "allowances" on a mileage basis or to the other line through "per diem." This practice is addressed by 49 U.S.C. §11122 (1982), which provides:

> (a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include –
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> (1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;
>
> (2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and
>
> (3) sanctions for nonobservance.
>
> (b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type

of freight car, and other factors that affect the adequacy of the national freight car supply.

LOSAC is an association of shippers using and providing covered hopper cars commonly known in the railroad industry as "LO cars." LO cars are used in virtually all rail movement of grain, grain products, fertilizers, and many chemical products. These cars in common with refrigerator cars, tank cars, and a few other private cars, are frequently furnished by shippers triggering the use of allowance compensation. Allowances are published as tariffs. *Tank Car Allowances, Southern Ry. System*, 329 I.C.C. 466, 476 (1967). Since at least the 1960's, these rates have been the subject of continuing dispute between the railroads on the one hand and the LO shippers on the other. LOSAC, formed in 1970, has functioned as the speaking mechanism of the shippers in the continuing dispute. In 1980, LOSAC reached an agreement with the railroads as to the structure and payment of such allowances. The 1980 agreement reflected national average costs of ownership. All parties operated under the agreement until May 24, 1982, when the railroads notified LOSAC of their intention to terminate the agreement and cease periodic updates which it had provided.[1] In February of 1983, LOSAC filed a formal complaint with the ICC against 252 railroads charging that the railroads' allowances were below applicable costs of owning and maintaining LO cars and, LOSAC contends, in violation of subsection 11122(b). LOSAC's complaint sought a determination that

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1 LOSAC did not try to enforce the agreement *qua* contract. Count 1 of the complaint alleged that the railroads' failure to make the agreed updates to the previously-agreed allowances constituted an unjust and unreasonable practice "and results" in unlawful allowances. Joint Appendix 52-53. The ICC stated in its opinion that lawfulness of the railroads' allowances under subsection 11122(b), not adherence to the 1980 agreement, was the issue in the case and LOSAC agrees. *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry. Co.*, 4 I.C.C.2d 1, 3 (1987); *see* Brief for Petitioner at 36. Accordingly, we have no issue before us regarding the 1980 agreement as such.

the present allowance structure violates that subsection and asked the ICC to require the railroads to pay future allowances consistent with the standards of subsection 11122(b) as well as damages for past allowances below that standard.

The railroads answered that subsection 11122(a) does not require the ICC to regulate allowances, and, if the ICC does regulate allowances, the statutes taken as a whole provide for the payment of below cost, market-based allowances in appropriate circumstances. The ICC heard oral argument in December of 1986 and held public deliberations February 24, 1987, at which a majority of the commissioners accepted the arguments of the railroads and voted to deny relief to LOSAC. On August 31, 1987, the Commission issued its written decision denying relief. *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry. Co.*, 4 I.C.C.2d 1 (1987). LOSAC then filed this petition for review.

B. *The ICC Decision*

After reviewing the parties' positions, the ICC described the consequences of the relief LOSAC sought: (1) huge damage claims with "serious" financial consequences for the railroads and (2) a loss of congressionally granted flexibility for the railroads in setting their rates for transportation in railroad-owned cars at levels competitive with other means of transportation. This latter effect followed, per the ICC, from the necessary combined effect of higher allowances to private-car shippers and anti-price discrimination requirements. The Staggers Rail Act of 1980, Pub.L. No. 96-448, §201(a), 94 Stat. 1898, 1899 (1980) (codified at 49 U.S.C. §10701a(c) (1982)) ("Staggers Act"), had given the railroads flexibility to reduce their rates to cover only their variable costs in depressed markets; the ICC viewed it as anomalous to permit railroads to have rate flexibility to compete in competitive markets and simultaneously to require that they pay

higher, "inflexible"[2] cost based allowances that make attainment of the first goal impossible. 4 I.C.C.2d at 9.

The ICC concluded that LOSAC's interpretation of the statute as requiring that it prescribe fully compensatory allowances is "simply wrong." *Id.* It read subsection 11122(a) as giving it discretion to regulate the subject, noting that it had never before prescribed allowances for LO cars "even in the heyday of regulation." *Id.* Second, the ICC determined that it must consider factors referenced in the second sentence of subsection (b) as well as the cost factors mentioned in the first sentence. The ICC viewed the legislative history as clear that subsection (b), considered as a whole, permits below-cost allowances.

The ICC next considered "whether the goals of the statute can best be served by allowing individual carriers to continue to publish allowances or by prescribing allowances for the entire industry." *Id.* at 11. The Commission found no need to prescribe industry-wide allowances, especially in light of the Staggers Act preference for individual over collective ratemaking, and saw the congressional purpose behind section 11122 as encouraging an *appropriate* supply of cars. *Id.* at 12. The ICC reasoned that granting LOSAC's requested relief was not required to ensure an adequate supply because the present supply of LO cars is more than adequate and was principally acquired when allowances were lower and were not periodically updated. *Id.* at 12-13. Moreover, the ICC reasoned that an increase in allowances would be inconsistent with the "efficient use," 49 U.S.C. §11122(a), of cars that the ICC is statutorily required to encourage since the rate increases occasioned thereby would cause railroads to lose

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2 LOSAC objects to the ICC's "inflexible" characterization, pointing out its submission of a variable formula. The ICC's usage, however, seems simply to emphasize that LOSAC's construction of the statute imposes an absolute floor on allowances of full-cost recovery, regardless of how sophisticated the formulas by which the level of that floor is determined.

traffic to other means of transportation aggravating the surplus of idle cars. 4 I.C.C.2d at 13. The Commission believed the "transportation use," 49 U.S.C. §11122(b), factor also supported its decision to take no action, since LO cars are used primarily for grain shipments, a highly competitive market, and the ICC believed that the record before it indicated that the allowance caps complained of were not significant outside the grain context. 4 I.C.C.2d at 13. The Commission concluded that the railroads' allowance levels had not been shown to be unlawful under section 11122. 4 I.C.C.2d at 13-14.[3] Finally, the ICC concluded that acceptance of LOSAC's proposed cost-floor standard for allowances was not necessary to protect LO shippers from abuse of market power by railroads. *Id.* at 18-19.

II. ANALYSIS

A. *The Decision for Review.*

[1] While maintaining the inadequacy of the Commission's written decision issued in August, 1987, LOSAC asserts that the decision for our review is in fact the transcript of the February 24, 1987, conference. At that publicly-conducted conference, the same majority of commissioners who later joined fully in the published decision voted to deny relief, and the same two commissioners who later dissented in part voted against the majority on some questions. LOSAC argues that the vote at this public conference was the decision and that we must, therefore, scrutinize the transcript and disregard the subsequent published decision as a *post hoc* rationalization.

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3 In further determinations that have not been brought before us by LOSAC's petition, the ICC rejected LOSAC's charges of unreasonable practices by the railroads and found that it was permissible for a carrier not to pay an allowance but to instead publish separate rate schedules for hauling in railroad- and shipper-furnished cars. 4 I.C.C.2d at 14-18.

This we decline to do. The ICC's formal opinion is its decision because the commissioners retained full authority to approve, disapprove, or modify it until published. LOSAC does not contradict this assertion or contend that the February 24 vote had immediate effect. This is, however, the critical difference between this case and our decision, cited by petitioner, in *Pan American World Airways, Inc. v. CAB*, 684 F.2d 31 (D.C.Cir.1982) (per curiam).

In *Pan Am* the Civil Aeronautics Board ("CAB"), after an unlawfully closed board meeting, issued an emergency order that lacked statutorily required findings of fact. Those followed twelve days later. On review of the order, this Court considered both the subsequently issued findings and a transcript of the preceding board meeting. *Id.* at 36 & n. 12. The majority and dissenter both distinguished the case there from a hypothetical case in which a decision, although made, had not been "*irreversibly made. Id.* at n. 12 (emphasis original); *see also id.* at 51 (Wilkey, J., dissenting). The situation before us now is the *Pan Am* hypothetical, and very closely resembles that in *Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191-92 (D.C.Cir. 1983). In *Kansas State*, the FCC had ruled against a party in a published decision. On review, the party submitted a transcript of an open meeting to demonstrate that it was the victim of agency unfairness. We struck the transcript from the record as part of protected pre-decisional processes. While we recognized in that case that *Pan Am* had involved our review of a transcript, we noted that the agency in *Pan Am* had not supplied a contemporaneous statement of reasons necessitating a review of the transcript in order "to dispose of the issue of whether the agency had complied with the Sunshine Act." *Kansas State Network*, 720 F.2d at 192. We further noted that the agency's failure in *Pan Am* to provide a written decision made it impossible for us to assess the reasonableness of the board's action without an examination of the transcript. None of these factors prevails here. Following in the footsteps of *Kansas*

State, we limit our review to reasons given in the ICC's published decision and, absent a compelling indication of error, we must defer to the Commission's interpretation of the statute, with the administration of which it is charged. *Black v. ICC*, 762 F.2d 106, 114-15 (D.C.Cir.1985).

B. *The Commission's Action.*

[2] The Commission ruled, contrary to LOSAC's contention, that it was within its discretion whether or not to issue regulations providing industry-wide terms for the use of non-railroad-owned equipment. LOSAC's contention that the statute *mandates* such regulation is based on the use of the word "shall" in 49 U.S.C. §11122(b). As LOSAC notes, congressional use of "shall" indicates the absence of discretion. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1191 (D.C.Cir.1985). However, LOSAC's argument here takes the word out of its statutory context. Subsection (b) relates not to whether or not industry-wide rates should be regulated but rather to what factors should be, indeed, must be, employed in determining what those rates will be if and when regulated. The relevant portion of the statute in the first instance is subsection (a) which specifies that the "regulations *may* include" the sort of regulations now sought by petitioner. (Emphasis supplied.) Just as the use of the word "shall" indicates the absence of discretion, the use of "may" indicates its presence. *See Matzke v. Block*, 732 F.2d 799, 801 (10th Cir.1984). While we recognize that the context of a particular usage may at times require the construction of "may" as mandatory or "shall" as permissive, no such modifying context is present here. *Cf. United Hosp. Center, Inc. v. Richardson*, 757 F.2d 1445 (4th Cir.1985). Accordingly, the Commission's determination that it is not required to prescribe compensation levels was within its statutory discretion, and we will not disturb that determination.

LOSAC's contention that the interpretation of this statute is for the court and that the ICC construction is not entitled to deference does not change our decision. *Consolidated Rail Corp. v. United States*, 619 F.2d 988 (3d Cir.1980), cited by LOSAC compels no different result than we reach. In that case, the Third Circuit noted quite rightly that the courts and not the agencies are "the final authorities on the proper interpretation of . . . statute[s]." *Id.* at 993 (citations omitted). The Third Circuit was reviewing the ICC's formulation of new rate regulations covering the per diem paid by a car-user line to a car-owning railroad. This involves construction of the predecessor statutes to the one we now construe, the predecessors being substantively the same as the present version. However, the question before the Third Circuit was not whether the Commission was required to regulate, but whether in regulating, it was required to consider all the enumerated factors. The Commission in that case had in fact expressly set the rates on the basis of reviewed cost of capital while expressly not considering the other factors listed in the statute. While that case held that Congress had mandated a consideration of all factors, not a portion, the case simply does not address the same question we face here. Neither does the decision stand for the proposition that the Commission is owed no deference on its interpretation of section 11122 when its decision does, as here, take into account all statutorily enumerated factors.

Neither is *MCI Telecommunications Corp. v. FCC*, 765 F.2ds 1186 (D.C.Cir.1985), cited by petitioner, authority for the proposition that the ICC does not have discretion to prescribe allowances. In *MCI*, the FCC had prohibited non-dominant carriers from filing tariffs, effectively requiring them to enter into individual contracts with customers. The applicable statute expressly provided, however, that "'*[e]very* common carrier . . . *shall* . . . file'" tariffs. *Id.* at 1191 (quoting and emphasizing 47 U.S.C. §203(a) (1982)). The FCC contended that its express statutory authority to "'*modify* any re-

quirement made by . . . this section,'" *id.* (quoting and emphasizing 47 U.S.C. §203(b)(2) (1982)), empowered it to take its action, but we held that the FCC had no authority to prohibit companies from filing tariffs. *Id.* at 1188. In the present case, however, Congress clearly granted the ICC discretion as to the precise subject at issue here. Accordingly, we find that the Commission is due the deference normally owed an agency's interpretation of a statute committed to its care.

[3] LOSAC's argument that the Commission must disapprove market-based allowances which are below cost as computed under the first sentence of subsection 11122(b) likewise compels no disturbance of the Commission's decision. The two sentences of that subsection must be read together. *See Consolidated Rail*, 619 F.2d at 993. The first is directed to the cost factors relied upon by LOSAC; the second to market factors which the Commission found to compel reduction below cost. Each sentence speaks with the imperative "shall." In neither sentence, nor in the two taken together, did Congress provide any conclusive evidence as to the relative weight to be afforded the various factors. It is by now hardly necessary to restate the principle that when Congress explicitly or implicitly leaves "a gap for the agency to fill," the courts will not substitute our own interpretation for that of the agency but will uphold the agency's interpretation provided only that it is a reasonable one. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837-843-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984).

The Commission's interpretation here is more than reasonable. The Commission has previously determined that the statutory factors, considered together, do not require that railroads pay rates of compensation that guarantee full-cost recovery to car-providing shippers. This construction is consistent with the ICC's decision in *Order Granting Railroads Flexibility in Setting Per Diem Levels*, 364

I.C.C. 107, 108-10 (1980), in which the Commission authorized railroads to reduce compensation charges for the use of their cars by other railroads below established inter-railroad "per diem" compensation rates "as a means of discouraging cross-hauling of empty cars . . . and hence as a means of improving car utilization" during a period of car surplus. *Id.* at 108. This decision was referenced with evident approval in the conference committee report to the Staggers Act,[4] H.R.Rep. No 96-1430, 96th Cong., 2d Sess., at 117 (1980), *reprinted in* 1980 U.S.Code Cong. & Admin.News 3978, 4149, with the added suggestion that the Commission permit per diem to rise *above* basic per diem when there is a car shortage. H.R.Rep. No. 96-1430, *supra*, at 118. The conference committee report states an intent that "marketplace decisions govern the railroad industry and its relationship with shippers." *Id.* at 118 (quoted at 4 I.C.C.2d at 11). The legislative history cited by the ICC relates to section 224 of the Staggers Act, which dealt solely with compensation-related matters. *See* Pub.L. No. 96-448, §224, 94 Stat. at 1929-30. The ICC's resort to legislative history adequately supported its construction of the language of the statute. LOSAC's counter-arguments do not compel the conclusion that the ICC erred in its construction, as they must to prevail.

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4 The Staggers Act repealed paragraph 11122(b)(2), which had authorized the Commission to establish an incentive increment to basic compensation when there was an inadequate car supply. Pub.L. No. 96-448, §224(a)(1), 94 Stat. at 1929. The repealed paragraph read in its entirety as follows: The Commission may increase a rate of compensation determined under paragraph (1) of this subsection by an incentive element only when the Commission finds that the supply of a type of freight car is inadequate and an incentive element will compensate freight car owners contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and national defense. The Commission may exempt that incentive element from the compensation to be paid by a carrier or group of carriers when the Commission finds that exemption is in the national interest.Revised Interstate Commerce Act, Pub.L. No. 95-473, §11122(b)(2), 92 Stat. 1337, 1422 (1978) (formerly codified at 49 U.S.C. §11122(b)(2)).

We, therefore, affirm the Commission's construction of subsection 11122(b) as permitting below-cost compensation to car-providing shippers.

Obviously, even given the deference owed the Commission's interpretation, we would not uphold an arbitrary and capricious rejection of LOSAC's complaint against the railroads' allowances. Certainly, the Commission would be required to take appropriate action if the rates were found to be unlawful. However, LOSAC's argument for unlawfulness rests wholly on its interpretation of subsection 11122(b) as requiring full compensation for costs of ownership and as, therefore, requiring all of the annual adjustments provided for under the 1980 agreement. The ICC's rejection of that narrow argument was proper. At some points in its opinion, however, the Commission purports to measure the railroads' allowances against the full range of criteria specified in subsection 11122(b). *See* 4 I.C.C.2d at 11-14. That attempt, as the ICC's vice chairman suggests in his partial dissent, is plainly insufficient. *Id.* at 22. We think the scope of the ICC's decision is correctly assessed in its own Conclusion: "Having rejected the proposition that uniform nationwide allowances should be adopted and must conform to historical ownership costs . . . we have fully disposed of the complaint. LOSAC has made no effort to show that specific allowances are unlawful under any standard that takes into account market conditions as they relate to all of the statutory factors." *Id.* at 19-20. On that basis, we affirm the ICC.

III. CONCLUSION

For the reasons set forth above, we hold that the petition before us is without merit. Therefore, the decision of the Commission will stand and the petition is denied.

APPENDIX B

INTERSTATE COMMERCE COMMISSION REPORTS

NO. 39117

LO SHIPPERS ACTION COMMITTEE

v.

ABERDEEN AND ROCKISH RAILWAY COMPANY, ET AL.

Decided August 12, 1987

Mileage allowances and rate differentials applicable to movements in private covered hopper cars found not shown to be unlawful. Complainant's request for prescription of uniform nationwide allowances on private covered hopper cars denied. Complaint dismissed.

Stephen C. Herman and *Harold E. Spencer* for complainant.

Michael Boudin, Emried D. Cole, Jr., Robert Cowell, Paul A. Cunningham, Christopher T. Curtis, John Doeringer, Paul R. Duke, Elizabeth V. Foote, Stuart F. Gassner, J. Michael Hemmer, Richard B. Herzog, Paul R. Hitchcock, Forrest N. Krutter, J. Stephen Lawrence, Jr., John B. Norton, Robert T. Opal. William R. Power, Michael Roper, Janet Scagnelli, William C. Sippel, John S. Walker, Louis P. Warchot, Dennis W. Wilson, F. Blair Wimbush and *W.J. Wochner* for defendants.

DECISION

BY THE COMMISSION:

The LO Shippers Action Committee (LOSAC or complainant) seeks a determination that the Nation's railroads are failing to publish lawful allowances on private covered hopper cars and requests a prescription of uniform nationwide covered hopper allowances for the future. We conclude that LOSAC has not shown that the railroads, either collectively or individually, have violated the Interstate Commerce Act. Rather, the complaint is based on an incorrect interpretation of the applicable law and it should be dismissed.

I. THE COMPLAINT

LOSAC, a trade association comprised of owners and users of private (non-railroad owned) covered hopper cars, filed its complaint February 24, 1983,[1] asking the Commission to declare unlawful: (1) the railroads' refusal, beginning in 1982, to make yearly collective updates in the levels of allowances published under a 1980 agreement between LOSAC and the Committee on Compensation of the Association of American Railroads (COC); (2) the publication by various individual railroads of rate tariffs with caps on mileage allowances; and (3) the publication by some in-

1 At LOSAC's request, the proceeding was held in abeyance until 1985 pending negotiations. Written evidentiary statements and briefs were then submitted to an Administrative Law Judge. Subsequently, we granted the parties' requests to issue a decision in the first instance by the entire Commission. We heard oral argument on December 2, 1986, and considered the complaint in an open conference on February 24, 1987.

dividual carriers of dual freight rates with allegedly inadequate differentials for rates in private cars below those for movements in carrier-owned cars. LOSAC and its members seek damages for alleged past violations of the act[2] and a prescription of covered hopper car allowances for the future. More than 200 railroads (the railroads or defendants) oppose the complaint.

II. EFFECT OF 1980 AGREEMENT

Before reaching the legal issues raised by LOSAC, we will consider whether the 1980 COC/LOSAC allowance agreement is, in itself, a source of railroad obligations enforceable by the Commmission.

Covered hopper allowances have always been set by the railroads. They have never been prescribed by the Commission.[3] LOSAC began negotiating allowance levels with the railroads in the early 1970's. After a number of interim adjustments, the two sides reached agreement on an allowance formula in 1980, and a general allowance tarrif reflecting the formula was published. In 1982, however, the railroads notified LOSAC that the formula was unsatisfactory under

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2 LOSAC has stipulated that it seeks damages for Count I (refusal to update allowances) only for shipments originating on and after October 1, 1985. It calculates these at $226 million a year. For Count II (mileage caps and differntial rates), it seeks damages for shipments dating back to February 24, 1981. Although not computed, these damages are estimated at $31 million for 1983 alone. Interest on the damages is also sought.

3 The history of changes in allowance levels is shown in the appendix to this decision.

then-current conditions, suspended collective annual updates under the formula, and requested a reopening of negotiations.. Despite negotiations between 1983 and 1985, no further agreement was reached. Since 1983, all new allowance filings have been made by individual carriers.

LOSAC acknowledges that the negotiated formula was not prescribed by the Commission. It states that it decided not to submit the agreement for Commission approval after the Commission declined to grant formal approval of an allowance agreement on other car types in another proceeding.[4] However, it notes that the Commission expressed its support for negotiated settlements in a 1982 decision.[5]

The railroads contend that an unprescribed allowance agreement does not create continuing obligations. They explain that they put the agreed formula into effect in 1980, but made no commitment concerning its duration and made no agreement that future changes would require LOSAC's approval. They further contend that forfeiture of individual

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4 No. 37481, *Shippers Equitable Compensation Action Committee – Petition for Declaratory Order – Agreement on Private Car Compensation (AAR Mechanical Designation RB, RBL and LV)* (not printed), served September 29, 1980 (*SECAC*). In that decision, the Commission stated that, "absent an issue over its lawfulness, we see no need to formally examine the agreement."

5 *Investigation of Tank Car Allowance System*, 367 I.C.C. 48, 50 (1982). The Commission there declined to intervene prematurely in the operation of a *prescribed* formula, but directed the parties to negotiate further.

carrier rights to take independent actions was not part of the agreement.

We find no basis to require collective adherence to an unprescribed formula. The fact that the railroads filed tariffs consistent with an agreed formula for a time does not mean that they had to continue to do so indefinitely. In 1980, we specifically denied a request in *SECAC, supra* note 4, to make a negotiated allowance formula on other car types binding for the future.[6] LOSAC had good reason to conclude that the 1980 covered hopper agreement would be viewed in the same light. When the allowance formula arrived at by the trade associations became unacceptable to the railroads, they refused to continue to use it as a basis for publishing allowances. Thus, the central question in this proceeding is not whether the allowances varied from the "agreed level," but whether they are lawful under the Act.

III. LAWFULNESS UNDER SECTION 11122

A. Contentions of parties. LOSAC argues that 49 U.S.C.§11122 requires that railroads pay allowances calculated to cover at least the cost of car ownership, regardless

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6 In *SECAC*, the Commission rejected an argument that the same situation was presented there as in the case of tank cars, on which the Commission did prescribe a negotiated formula. The Commission explained that the tank car agreement served to resolve longstanding litigation before the Commission and observed that the railroads had agreed to the tank car formula only on the condition that its terms not be made applicable to other types of privately owned cars. *SECAC, supra*, 1. We note also that virtually all tank cars are privately owned, a fact that is significant in view of our discussion below of the practical effects that fixed covered hopper allowances would have on traffic movements in railroad-owned cars. *See* part III B below.

of factual circumstances and their relation to the car hire compensation criteria enumerated in that secion. It places controlling weight on the statement in §11122(b) that:

> The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor.

Because this section provides that the rate of compensation "shall" be determined on the basis of the specified cost elements, LOSAC sees no room for allowances that fall below a cost of ownership level.[7] LOSAC also refers to past Commission decisions in which allowances are described as being related to the cost to the shipper of owning and maintaining the equipment.[8]

In LOSAC's view, the only way to comply with a requirement for cost-based allowances is for the Commission to prescribe a uniform, nationwide allowance formula for covered hopper cars. For the past, LOSAC urges that the 1980 COC/LOSAC formula be taken as the standard of lawfulness for cost-based covered hopper allowances. For the

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7 Although LOSAC recognizes that §11122 also calls for consideration of other factors (discussed below), it argues that these factors can only justify increases in car compensation during car shortages, not decreases below the cost-of-ownership level during car surpluses.

8 *E.g., Tank Car Allowances in Official Territory*, 313 I.C.C. 435, 438 (1961); *Dixie Carriers, Inc., Rates and Allowances*, 278 I.C.C. 417, 423 (1950); *Mileage Allowances on Refrigerator Cars*, 218 I.C.C. 359, 364 (1936).

future, LOSAC seeks prescription of a modified formula that would, among other things, incorporate a high cost of capital. Because LOSAC takes the 1980 negotiated formula as the standard for past allowances under §11122, it contends that the railroads have been violating §11122 in not updating allowance levels yearly through recomputations based on current repair charges, interest rates, and average loaded mileage, as provided in the formula.[9]

LOSAC also identifies 220 specific tariffs on which the allowance payable is subject to specified ceilings or "allowance caps"[10] or on which there are no mileage allowances and, in LOSAC's view, there are inadequate differentials between freight rates for movements in private cars and those for movements in carrier-owned cars. Since these allowance caps and differentials deviate from the allowance levels provided by the 1980 formula, LOSAC considers them to be in violation of §11122.[11]

In reply, the railroads deny that their allowance practices have been shown unlawful in light of the applicable statutory provisions and regulatory policies. First, they argue that the Commission is not required to prescribe car compensation at all; §11122 merely provides that the Commission's regulations "may" include the compensation to be paid for use of a freight car.

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9 For the year 1984, for example, the railroads' general mileage allowance tariff, without the updates sought, provided for allowances ranging from 9.7 to 54.6¢ per mile, depending on the age and original cost of the car. Had the allowances been updated in 1984, they would have ranged from 13.6 to 93.2¢ per mile. Complainants' verified statement no. 2 (Gerald W. Fauth, Jr.), appendix GWF-D, 4.

10 The ceilings range from 18 to 40¢, the most common being 24¢.

11 In addition, the Consolidated Rail Corporation (Conrail) withdrew from the national mileage allowance tariff and established its own system-wide schedule of allowances effective October 1, 1985. LOSAC considers the Conrail action to be subject to the same standards LOSAC urges for judging other covered hopper allowance actions.

Moreover, they note, if the agency does prescribe car compensation, §11122 requires it to consider a number of non-cost factors, including encouragement of efficient car use [§11122(a)], the transportation use of each type of car, the national level of ownership of each type of car, and other factors that affect the adequacy of the national freight car supply [§11122(b)].

The railroads argue that, when the supply of cars greatly exceeds the demmand, as it has in recent years, car compensation must be permitted to fall to reflect the current market values of cars. Such allowance reductions, they explain, allow freight rate reductions to stimulate traffic movement and greater car utilization, and signal investors not to make further car acquisitions that would aggravate the surplus. The railroads contend that requiring strict adherence to an allowance formula based on historical cost[12] under those conditions would contravene the statutory mandate to encourage efficient car use and to give consideration to the national level of car ownership. They note that Commmission decisions since the Staggers Rail Act of 1980 have uniformly affirmed the necessity to consider the non-historical cost factors in §11122 and to give greater effect to current market forces and present opportunity costs.[13]

The railroads note that, if they had published revised tariffs in adherence to the COC/LOSAC update formula in and after 1982, this would have produced large allowance

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12 By "historical cost," the railroads mean the car owner's original investment in a car plus a return on the original investment. They distinguish this cost concept from others such as "variable cost" and "opportunity cost," which they say are commonly used in lieu of historical or book cost.

13 *See* Ex. Parte No. 334 (Sub-No. 7), *Suspension of Car Hire Updates* (not printed), served January 2, 1986, slip op. at 1; *Car Service Compensation – Basic Per Diem Charges*, 1 I.C.C.2d 742, 749-50 (1985); and Ex Parte No. 328, *Investigation of Tank Car Allowance System* (not printed), served November 4, 1983, slip op. at 4.

rate increases when there was already a substantial surplus of covered hopper cars and when market responsive prices would have been falling. Allowance rate increases, they say, would have forced freight rate increases (so that they could recover the added allowance expense) and that these would have further depressed traffic movement and car use, injuring both shippers and carriers alike.

The railroads have responded to LOSAC's challenges to allowance caps and rate differentials published by individual carriers with detailed statements from the pricing officers of the railroads involved. These witnesses explain that their companies sought to remedy depressed market conditions, particularly for grain traffic, with reduced freight rates premised on use of surplus railroad-owned cars.[14]

When these carriers were asked to extend similar reduced rates to users of private cars, they could do so only by establishing allowance caps or zero-allowance rates with limited rate differentials because they could not have afforded to pay full allowances at the reduced freight rate levels. The railroads state that the shippers using private cars, many of whom are LOSAC members, willingly accepted many of the tariffs included in this complaint.

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14 For example, the witness for the Norfolk Southern Corporation testified as follows: *Under surplus conditions, we try to recover only the distance-related costs of using our own cars (such as repairs); we recognize that the market will not allow us to recover the time-related costs (such as the value of our original investment). Both we and our shippers are better off if we can get our cars moving at these low rates.* Defendants' verified statement no. 21 (R.M. VanHook), 17-18.

Nearly all the tariffs cited by LOSAC apply to grain. The railroads state that their rates on this traffic have been constrained by barge competition, by truck competition on short-haul movements, and by a weak market for grain. To enable American grain producers to compete in export markets, the railroads state that they have been forced to reduce their freight rates on grain an average of 26% since 1980.[15] Similarly, the carriers note that a cement tariff with an allowance cap cited by LOSAC provides a freight rate reduction on short-haul truck-competitive movements. As in the case of the grain tariffs, the railroads say that this rate reduction was made possible only by use of surplus rail-owned cars and feasible for private car application only with an allowance cap.

B. Consequences of fixed allowances. We begin our analysis by considering the practical effects that would flow from regulating covered hopper car allowances in the mmanner proposed by LOSAC.

One consequence is that the railroads would face enormous damage claims, possibly in the neighborhood of $600 million.[16] The financial consequences for the railroads could

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15 LOSAC's evidence also purports to show certain "zero-allowance" grain tariffs in which the rate for movements in private cars is actually higher than for movements in carrier-owned cars. The railroads state, however, that LOSAC's exhibit is inaccurate, because a regular allowance is paid on the private car movements, and the higher freight rate for private car movements merely serves as a partial allowance offset. The freight rate reductions on these movements ranged up to 48%, *Id.* at 17.

16 *See* note 2, *supra.*

be serious, since they would have no way of recouping additional costs incurred now for services provided in the past.

Another consequence, possibly even more serious in the long run, is that the railroads would lose the ability to set competitive freight rates on shipments transported in their own cars. To reach this conclusion requires several steps.

First, allowances would rise substantially if we prescribed them as requested by LOSAC.[17] As noted, when the present record was made, many tariffs that contained reduced freight rates on grain included allowance caps of 18 or 24¢ per mile. Without caps, the highest allowances under the general covered hopper allowance tariff would increase to nearly 55¢ per mile. If the updates sought by LOSAC were in effect, the highest allowances would increase to about 92¢ per mile.[18] If a modified formula were prescribed for the future, as requested by LOSAC, some allowances could rise as high as $1.19 per mile.[19]

Second, higher allowances would mean higher freight rates. We see no reason to doubt the railroads' declarations that they could not pay allowance increases of these magnitudes without increasing their freight rates. Most of the traffic transported in covered hoppers is subject to strong market-imposed pricing constraints and has been moving at reduced rate levels under prevailing market conditions, meaning that

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17 At the time the record in this proceeding was made, large surpluses of covered hopper cars existed. Currently, export grain sales have increased. The surplus of railroad-owned covered hopper cars has decreased and spot car shortages are occurring in the west. We expect that both freight rates and allowances will fluctuate due to changed market conditions such as these without regulatory intervention and will continue to be adjusted upward and downward as future market conditions dictate. Our discussion in this section applies to the consequences of regulation-induced allowance and rate increases that take place in disregard of market conditions.

18 Estimate for 1985. Complainant's verified statement no. 2 (Gerald W. Fauth, Jr.), appendix GWF-D, 5.

19 Estimate for 1985. *Id.*, appendix GWF-E, 5.

the railroads have had limited, if any, ability to absorb further costs at existing rate levels.

Third, freight rate increases would have to apply to shipments in carrier-owned cars as well as to those in private cars. When an allowance is published, it relates to a freight rate that applies regardless of car ownership. Thus, in increasing the rate for movements in private cars, the carrier would also be increasing the rate for movements in carrier cars, for it is the same rate. Where no allowance is published, there are dual rate scales, but LOSAC maintains that the differential between the private car rate and the carrier-car rate must be no less than a cost-based allowance. If the railroads must enlarge the rate difference and cannot further reduce the rate on private car movements, they would have to raise the rate on movements in carrier-owned cars.

Fourth, higher freight rates would make rail service more expensive for shippers that use carrier-owned cars. Higher

freight rates might or might not adversely affect movements in private cars. For shippers who own their cars, the higher freight rates could be offset by the higher allowances. Many shippers who lease private cars from third parties might also have benefits that would offset the higher freight rates.[20] For shippers who use carrier-owned cars, however, higher freight rates would clearly mean higher transportation costs if these shippers continued to use rail service. The effects of LOSAC's proposal on users of carrier-owned cars is a very serious concern, because the railroads own more than half of the covered hopper fleet.[21]

An important aspect of the pricing flexibility granted the railroads in the Staggers Act was the freedom to reduce freight rates to levels covering only short-run costs in depressed markets.[22] To exercise this flexibility on traffic moving in carrier-owned cars, an individual railroad should be able to set its rate at a level that covers (in addition to

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20 In many cases, allowances are paid to the car lessor rather than to the shipper. Private car leases often provide, however, that the shipper's lease payment obligations are reduced by the allowances earned by the car.

21 The record contains the following covered hopper ownership data, rounded to thousands: Railroads – 169,000; Private Car leasing companies – 95,000; Shippers – 36,000; Total Fleet – 300,000. LOSAC's shipper members own or lease about 65,000 of these cars. Sources: defendants' verified statement no. 6 (John J. Robinson), 6; complainant's verified statement no. 1 (Joseph C. Gasz), 2.

22 A rate that contributes to the going concern value of a carrier is conclusively presumed not to be below a reasonable minimum, 49 U.S.C. §10701a(c)(1). In determining whether a rate contributes to going concern value, the Commission may not consider "any expense that does not vary directly with the level of transportation provided." 49 U.S.C. §10701a(c)(4)(B). See generally Cost Standards for Railroad Rates, 364 I.C.C. 898 (1981), *aff'd sub nom Water Transport Association v. I.C.C.*, 684 F.2d 81 (1982). The Conference Committee report on the Staggers Rail Act states that: *All shippers as well as the carrier are better off if traffic which makes a contribution moves than if it does not, because the carrier is made financially stronger and need not rely as much on revenue from other shippers. The Conferees do not intend . . . that rates which are contributing to the going concern value of a carrier should be forced to be raised.* H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 90 (1980).

directly variable non-equipment costs) only the immediate cost that it incurs in providing a car. If it has an idle car available, the only equipment cost incurred may be the car maintenance cost attributable to the movement. If it must rent a car, its equipment cost is the rental fee, which is likely to be low during a car surplus. Certainly, from the standpoint of competitive pricing and the ratemaking flexibility created by the Staggers Act, a railroad should be free to set its rates in accordance with its own relevant costs.

If required to pay allowances based on the full historical cost of car ownership, however, the railroads would be compelled, for the reasons explained, to set their rates for movements in their own cars at considerably higher levels than their own car costs require during a surplus. The railroads indicate that they could lose a substantial amount of traffic as a consequence. It would seem anomalous for Congress to have emphatically decreed flexibility for railroad freight rates in competitive markets,[23] while at the same time mandating uniform and inflexible car compensation rates that render the goal of competitive grain freight rates unattainable. This brings us to the main question in this proceeding – whether the car compensation standard actually established by Congress permits recognition of market conditions.

C. Statutory requirements. LOSAC's principal argument – that the statute requires the Commission to prescribe

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23 The Staggers Act Conference Committee declared: *The purpose of this legislation is to reverse the decline of the railroad industry, which has been caused, in part, by excessive government regulation. The Conferees believe that by allowing the forces of the marketplace to regulate railroad rates wherever possible the financial health of the railroad industry will be improved and will benefit all parts of the economy, including shippers, consumers and rail employees.* Id., 89, The very first clause of the Rail Transportation Policy is as follows: *To allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail. [49 U.S.C. §10101(a)(1)].*

private car allowances at least as high as historical costs regardless of the consequences for other factors listed in the statute – is simply wrong.

First, LOSAC ignores the fact that the Commission's mandate to set allowances in the first place is clearly discretionary. §11122 says that the regulations "*may include*" (emphasis added) the compensation to be paid. Thus, the agency is not required to prescribe compensation for any type of car. *See, e.g., Car Service Compensation – Basic Per Diem Charges* 1 I.C.C. 2d 742, 743-46 (1985) and Ex Parte No. 334 (Sub-No. 6), *Review of Car Hire Regulation* (not printed), served April 29, 1985, slip op. at 1-6. As previously noted, the ICC has never found it necessary to prescribe a uniform system of compensation to be paid for privately owned covered hopper cars, the cars at issue here. If the agency never prescribed allowances for these cars even in the heyday of regulation, it seems unlikely that Congress intended such action in the era of reduced regulation since the Staggers Act.

Second, the Commission has consistently recognized that, when it prescribes car hire compensation, it must consider the sometimes conflicting goals of: (1) a "fair return" on costs; and (2) the national level of car ownership and other non-cost factors that affect the supply and efficient use of cars. *See e.g., Car Service Compensation – Basic Per Diem Charges, supra*, 749:

> Indeed, the statutory command that the Commission consider current cost of capital is tempered by the requirement that the Commission also consider the transportation use of each type of freight car, and other factors that affect the adequacy of national freight car supply.

See also Exemption from Regulation – Boxcar Traffic, 367 I.C.C. 747, 760 (1983); Ex Parte No. 334 (Sub-No. 7), *Suspension of Car Hire Updates* (not printed), served January 2, 1986; No. 39908, *Mileage Allowances for Covered Hoppers,*

Grain and Grain Products, BN (not printed), served December 5, 1985; *Order Granting Railroads Flexibility in Setting Per Diem Levels*, 364 I.C.C. 107, 109 (1980); and *Zone of Reasonableness for Car Hire Charges*, 364 I.C.C. 299, 306 (1980).

The courts have confirmed the Commission's longstanding and consistent interpretation in the only two cases where the issue has been raised. The Third Circuit made clear that statutory factors other than costs must be weighed before car compensation is prescribed in *Consolidated Rail Corp. v. United States*, 619 F.2d 988, 996 (3rd Cir. 1980) (*Conrail*): "These factors are designated, we think, as important factors to be used in encouraging the efficient use of freight cars." The Third Circuit emphasized that the other statutory factors *must* be weighed before car payments are prescribed. *See also Brae Corp. v. United States*, 740 F.2d 1023, 1058-1059 (D.C.Cir. 1984), where the court cited the *Conrail* case with approval and noted that "§11122 presents a distinct statutory provision with specific requirements that the Commmission must satisfy when it chooses to impose a new regulatory format over the car hire relationship."

It is clear from the legislative history of §11122 that this statute permits allowances to reflect market conditions and to fall below historical cost recovery levels during periods of car surplus. The first statutory mention of car compensation based on ownership expense occurred in 1966.[24] It was eleborated to its present form in 1976.[25] The other statutory factors discussed by the railroads also originated in the 1966 and 1976 legislation, as did a provision authorizing the Commission to establish an incentive compensation element above ownership expense. The problem confronting Con-

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24 Pub. L. 89-430, §1, 80 Stat. 168, amending section 1(14)(a) of the Interstate Commerce Act (now §11122).

25 Pub. L. 94-120, §212(a), 90 Stat. 46, further amending section 1(14)(a).

gress and the Commmission during this period was that collective action by the railroads and regulatory action by the Commission had failed to produce car compensation levels high enough to stimulate a level of equipment investment that would overcome chronic car shortages.

By 1980, the car shortages were ending and the problem of surpluses was beginning to appear. In the Staggers Act, Congress deleted the incentive provisions of §11122. In its report accompanying the final bill, the Conference Committee interpreted the remaining provisions of §11122 in the light of current conditions and the new congressional policy of greater reliance on market forces.

The Conference Committee's report acknowledged the Commission's efforts to allow "per diem rates below basic per diem levels during periods of excess car supply."[26] It directed the Commission to continue to "examine means (such as flexible car hire) for making basic car hire more responsive to market forces."[27] Moreover, in a statement particularly relevant to allowances, which traditionally had not been prescribed, the Committee stated that, "[t]he conferees intend that marketplace decisions govern the railroad industry and its relationship with shippers."[28]

Congress viewed the existing language of §11122 as broad enough to embrace a market-oriented approach to car compensation. Whether or not the cost recovery sentence of

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26 H.R. Rep. No. 96-1430, 96th Cong. 2nd Sess. 90 (1980).

27 *Id.*, 117.

28 *Id.*, 118. This statement appears in the Committee's specific discussion of the subject of car compensation.

§11122(b) refers only to historical cost,[29] the other factors mentioned in the statute easily lend themselves to consideration of current market conditions, as we shall illustrate.

D. Application of statutory factors. We have established that the prescription of allowance rates is discretionary and that if we prescribe we must consider various factors. The question next posed by this case is whether the goals of the statute can best be served by allowing individual carriers to continue to publish allowances or by prescribing allowances for the entire industry. If actions of individual carriers are consistent with the statutory factors, we have no reason to displace those actions with a nationwide prescription. Indeed, requiring all carriers to set their allowances at the same level would run directly contrary to the preference expressed in the Staggers Act for individual rather than collective ratemaking,[30] as well as disregarding most of the factors in §11122.

In analyzing present allowances and those sought by LOSAC under the statutory factors, we will first consider cost of ownership. This factor has not been ignored in the setting of allowances for covered hopper cars. Coverage of ownership cost was a basic consideration in the development of the 1980 formula, which the railroads implemented in a general allowance tariff. That tariff remains on the books and still is the source of allowances on some movements, par-

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29 The railroads urge that the reference to "current cost" in this sentence be interpreted as referring to the present worth of a car or its "opportunity costs." While this appears to be a permissible interpretation, and one that is possibly justified by the Conference Committee's report, we do not rely on it today. While the sentence has traditionally been interpreted as referring to coverage of historical cost, we find no need to resolve the issue here.

30 The Conference Committee, in explaining the Act's severe limitations on collective ratemaking [see 49 U.S.C. §10706(a)(3)(A)], stated that, "railroads, shippers, and consumers will benefit from increased rail to rail competition." H.R. Rep. 96-1430, 96th Cong. 2d Sess. 113-114 (1980). *See also* 49 U.S.C. §§10101a(1) and (11).

ticularly those using specially equipped types of cars that the railroads do not own. On other movements, that tariff is often the point of departure for allowance modifications or caps.

Nevertheless, controlling weight cannot be accorded to coverage of the cost of ownership without regard to other considerations specified by §11122. At the outset, that section requires the Commission to "encourage the purchase, acquisition, and efficient use of freight cars." Encouraging purchase and acquisition, when read in the light of the Conference Committee's explanation that marketplace decisions are to govern, must refer to encouraging an appropriate level of car ownership, not a boundless continuing expansion of the fleet that disregards conditions of supply and demand.

Reinforcing this interpretation are the requirements in §11122(b) that we consider the "national level of ownership" of each type of freight car and "other factors that affect the adequacy of the national freight car supply." Clearly, Congress does not expect us to ignore the existence of an already adequate or excessive fleet in determining the level of car compensation.

Taking these factors into account, we are unable to conclude that the allowance levels sought by LOSAC are legally required. For the past 6 years, the national level of ownership of covered hopper cars has been considerably higher than necessary to meet the overall demand. Moreover, at the time most of the present fleet was acquired, allowances were far below the levels LOSAC now seeks. The basic COC/LOSAC formula, even without yearly updates, actually doubled the allowances that had been payable on the most expensive cars prior to 1980, when most car purchases took place. Furthermore, under the allowances that prevailed prior to 1980, there were no yearly updates. In considering these facts, we are unable to conclude that updates

under the 1980 formula are required to encourage acquisition of an appropriately sized covered hopper fleet.

Moreover, we note that the allowance caps of which LOSAC complains generally have not held allowances below the highest levels (18 to 24 cents per mile) that were in effect when the preponderance of the present fleet was acquired. Indeed, these caps seem to have been generally in line with the costs the railroads would have incurred to obtain leased cars in the open market at the time this record was made.[31] The capped allowances may actually have been generous in comparison to the small distance-related costs that the railroads would have incurred in using idle cars that they already owned. Thus, LOSAC has provided no empirical basis upon which we might conclude that the capped allowances have been inappropriate, under prevailing market conditions, for maintenance of an adequate fleet of covered hopper cars.

An especially important factor under §11122 is the requirement that the Commission encourage the efficient use of freight cars. From the standpoint of efficient car use, we believe that the allowances sought by LOSAC would be harmful. We are not shown how the major allowance increases it seeks, whether by updates, removal of allowance caps, or increasing of rate differentials, could occur without freight rate increases. Rate increases that disregard demand conditions would result in a loss of traffic moving in covered

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31 The railroads received offers of leased cars at rates ranging from 18¢ to 26¢ per mile and could have purchased four-year-old cars at only 40% of their original cost.

hopper cars and a reduction of freight car use.[32] Efficient car use, we believe, requires that car compensation not be set at levels that discourage car use when surplus conditions exist.

The other factor to be considered under §11122 is the "transportation use" of each type of freight car. The primary use of covered hopper cars is shown to be the transportation of grain. Because of demand and competitive conditions, the railroads have had to minimize rate levels in order to encourage rail transportation of grain. Most of the challenged allowance caps and rate differentials apply to this freight car use. Where covered hoppers have other transportation uses, and particularly where specialized equipment is used of a type that the railroads do not provide, the record suggests that the railroads have not found it necessary to resort to allowance caps to a significant degree. This pricing pattern appears unassailable from the viewpoint of responsiveness to market conditions.

Taking all the factors of §11122 into account, the assailed levels of car compensation on private covered hopper cars have not been shown to be unlawful. Under prevailing market conditions, reductions below full cost-of-ownership allowance levels have been justified by considerations of excessive fleet size and the need to maximize car use. In fact, the record in this case shows that allowing market based car hire returns, instead of prescribing fixed returns, best accommodates the various factors we are required by the statute to consider.

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32 As previously discussed, shippers of all covered hopper traffic would likely pay higher freight rates but shippers who own private cars would receive higher allowances and might be in no worse net position, while shippers using railroad-owned cars would have to pay higher rates. Even though higher allowances on private cars might operate mainly to decrease use of railroad owned cars, any decrease of car use through price increases not warranted by market conditions would be inefficient.

V. UNREASONABLE PRACTICE ALLEGATIONS

LOSAC also contends that the allowance caps are an unreasonable practice within the meaning of 49 U.S.C. §10701(a), because they are inequitable to shippers who were forced to buy cars during the 1970's and who relied on the availability of car allowances in deciding to make car purchases. LOSAC argues that it is unreasonable for the railroads not to pay allowances based on full ownership cost after they failed to meet their obligation to supply an adequate number of railroad-owned cars, verbally prodded shippers to acquire their own cars, and give tariff inducements for the use of private cars.

The railroads deny that the present private fleet was acquired because of any failure by the railroads to meet car supply obligations. they note that, during the escalating demand for covered hoppers in the 1970's, they added some 50,000 new railroad-owned cars to an existing fleet of 125,000. Although some carriers were short of capital during this period due to financial difficulties, there were also other reasons why the railroads did not acquire more cars. For one, the volume of private car orders was so heavy that the railroads had difficulty getting car manufacturers to fill the railroads' orders. Moreover, when demand for grain was heaviest, congestion at ports was a constraint on their ability to serve shippers regardless of car availability. Finally, the railroads could not justify the purchase of cars used only during peak demand periods, because they believed that over the long term the rates available from the traffic would not cover the cars' investment costs.

The railroads also contest LOSAC's claim that the private car fleet was acquired in reliance on cost-based allowances. They note that virtually all private covered hoppers were acquired before the 1980 formula became effective and during a period when allowances were no more than 18 to 24¢ per mile, compared to allowance rates as high as $1.19 per mile

now sought by LOSAC. The railroads also point out that product marketing advantages and tax benefits were important inducements for private car acquisition.

Without deciding whether the prohibition against unreasonable practices in 49 U.S.C. §10701(a) embraces broad equitable claims such as LOSAC's, we find the position taken by LOSAC to be unsupported by the evidence. First, as the railroads indicate, they acquired covered hopper cars to the best of their ability, to the extent that they could justify car investments based on projected revenue from the traffic. That is all the law requires. Railroads are not expected to acquire equipment that cannot be economically justified by the traffic available.[33] It follows that the shippers' or car investors' purchase of cars for peak loadings does not impose an equitable obligation on the railroads to pay the full cost of those cars through cost-based allowances. Such an obligation would not be different in substance from requiring the railroads to purchase the cars.

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33 The duty to supply cars is not absolute. *See Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981). The Commission may not require carriers to acquire equipment unless it finds that the amount spent will be recovered. See 49 U.S.C. §11121(a)(1)(B). We have specifically found in relation to covered hopper cars that: *[I]t would be a questionable use of limited railroad capital for the carriers to acquire all the equipment needed to handle the periodic peak traffic when these cars would otherwise sit idle.* No. 38692, *Shippers Committee OT-5 – Review of OT-5 Agreements* (not printed), served December 23, 1981, slip op. at 6.

In addition to a perception that railroad equipment would be inadequate at a particular peak period, shippers may have relied on allowances as a factor in making car purchase decisions. However, this point must be put into perspective. First, it is clear that the shippers' main reason for acquiring cars was to market their products.[34] Car purchasers also received substantial tax benefits, such as investment tax credits, interest deductions, and accelerated depreciation deductions.[35]

Moreover, even if car allowances were calculated on the basis of ownership cost when car purchases were made, the shippers had no guarantee that the same method of calculation would continue indefinitely. There is no evidence that they were promised a permanent continuation of formula-based allowances either by the Commission or by the railroads. At best, they were relying on what they perceived as a regulatory framework that they believed required such allowances. Regulation is not a guarantee that the status quo will continue.[36] Regulation reflects changes in law, changes in regulatory policy, and changes in factual circumstances. The duty of a regulatory body is not to do what it has always done in the past, but to do what is reasonable and in accord-

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34 For example, the witness for Bunge Corporation stated as follows: *The need for covered hopper cars [in the 1970's] was created by the immense volume of grain to be exported and the inability of the railroads to satisfy that need . . . Grain shippers and particularly exporters maintained huge investments in inland and export facilities. There were also millions of dollars tied up in grain inventory during the 1970's that was producing no return because of our inability to deliver to our domestic and export customers. The addition of cars to Bunge's private fleet became essential for marketing purposes and to meet contract delivery terms.* Complainant's verified statement no. 15 (Norman Walker), at 13.

35 Defendants' verified statement no. 8 (William J. Romig), at 7.

36 *See American Trucking Assn. v. Atchison, T & S.F. Ry. Co*, 387 U.S. 397, 416 (1967).

ance with law and public policy under present-day conditions.[37]

We are not convinced that the railroad actions have been contrary to reasonable expectations. One of the actions challenged is the railroads' refusal to make updates that would produce large allowance increases. The update provisions in question were not even in effect when most of the private car fleet was acquired. Moreover, the magnitude of the updates produced by the 1980 formula resulted from economic conditions that virtually no one anticipated beforehand: extremely high interest rates coupled with an economic recession. It is unlikely that shippers relied upon the prospect of receiving such updates when acquiring cars. Finally, even if any car purchaser had anticipated the updates actually produced by the formula, it should have had serious doubts either that the railroads would voluntarily publish such self-destructive allowance rate increases or that the Commission would require them.

Similarly, no reasonable reliance or expectation has been defeated by the challenged allowance caps and rate differentials under prevailing market conditions. First, many of the benefits for which the cars were acquired have already been realized, including the ability to move the shippers' traffic during peak flows and the tax benefits. Second, while allowances were reduced on many grain cars, the freight rates on grain traffic were generally reduced by much greater amounts.[38] The true concern of LOSAC's members may be

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37 In fact, investors who purchased securities of car investment companies during this period were advised in prospectuses that the earning power of the cars could be affected by, among other things, changes in governmental regulation.

38 For example, Union Pacific's average reduction in grain freight rates has been $1.12 per mile, compared to allowance caps that have reduced allowances by at most 25 to 30 cents per mile. Defendants' verified statement no. 4 (Thomas M. Caron),, 23; see also defendants' verified statement no. 22 (Peter C. White) 4-6.

that they expected to have more of a price advantage over their competitors who use rail-owned cars, but we do not see that regulation should give them a greater advantage than the value of the cars they provide, and in a car surplus, their cars, like the railroads' own cars, are of diminished value. If covered hopper cars are again in short supply, the value of cars will rise, and the compensation received by private car providers (and the advantage of these providers over users of rail-owned cars) can be expected to increase accordingly.

We conclude that private covered hopper car owners have no equitable claim to higher levels of car compensation than are required under §11122 and warranted under current market conditions. The statute does not guarantee them a particular return on investment nor do we believe that would be a reasonable policy when identical cars purchased by the railroads do not receive that protection.

VI OTHER MATTERS

A. Lawfulness of "zero-allowances" rates. A side issue raised by LOSAC in its challenge to the railroads' dual rate scales is whether "zero allowance" rates are lawful. LOSAC contends that private car use must be compensated by allowances, not by freight rate differentials. The cases cited by LOSAC merely stand for the proposition that allowances must be openly published and applied without discrimination. As the railroads note, however, "[i]t has long been accepted that railroads may eliminate allowance payments and instead compensate a shipper for supplying private cars by adjusting the freight rate."[39] Thus, they argue that LOSAC's

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39 Citing *Natural Gas Pipeline Co. v. New York Central R.R.*, 323 I.C.C. 75, 79 (1964) (*Natural Gas Pipeline*), and *Eastern Central Motor Carriers Ass'n. v. Baltimore & O.R.R.*, 314 I.C.C. 5 (1961), *aff'd sub nom. Cooper-Jarrett, Inc. v. United States*, 226 F. Supp. 318 (W.D. Mo.), *aff'd per curiam*, 379 U.S. 6 (1964).

view that dual rate scales with zero-allowance rates are unlawful is unfounded.

LOSAC quotes the following passage from a 1935 Commission decision:

> [In lieu of performing a service,] the carrier may compensate the shipper, as owner of the goods transported, by way of an allowance . . . for any services rendered which the carrier is legally obligated to perform under its line haul rates.[40]

This means the carrier is obligated to publish an allowance for a service rendered by the shipper only if the carrier is obligated to perform the service under its line-haul rate. Where a carrier publishes a rate specifically applicable only to movements in private cars, the carrier is not obligated to provide a car and has no obligation to publish an allowance.

That the Commission has long accepted dual rate scales with zero-allowance rates is reflected in the following passage:

> When a carrier offers a lesser service for a lower rate than the rate for a complete service, and the offer at the lower rate is accepted by the shipper, the carrier is not obligated to do more than it has offered to do for the lower rate, and no allowance can be made to a shipper for performing a service the avoidance of which is the consideration for the lower rate.[41]

A railroad escapes no legal obligation concerning car compensation by publishing zero allowance rates in dual rate scales. The adequacy of the differential is subject to the same tests as the adequacy of an allowance.

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40 *Pacolet Mfg. Co. Operating Allowance*, 210 I.C.C. 475, 477 (1983) (*Pacolet*).

41 *Natural Gas Pipeline, supra*, 99.

B. Market power. LOSAC also contends that strict adherence to an owner's-cost standard is necessary to protect car owners from unjust treatment at the hands of railroads with market power. LOSAC argues that the railroads have the power, absent regulation, to force car owners to accept inadequate compensation. It notes that each individual railroad has the ability to limit the supply of shipper cars on its lines by withholding OT-5 authority.[42] It also describes the railroads as "a very limited number of buyers who among themselves can fix the price at which they buy."

The railroads reply that LOSAC's OT-5 argument misconceives the nature of a free market. They observe that a railroad's withholding of OT-5 authority is equivalent to a refusal by the railroad to purchase the use of a car. In a free market, buyers are not coerced into buying; a seller assures itself of a competitive price, not by having the government require purchases or dictate minimum price levels, but by seeking out alternative bids from other buyers.

In their discussion of the market for covered hopper cars, the railroads describe a "buyer" as one who acquires a car from a supplier through purchase or lease, or through compensation (such as an allowance) for temporary use. These buyers include both railroads and shippers that buy or lease cars as well as railroads that pay allowances for temporary use of cars. Thus, the railroads state that there are many, not few, buyers for covered hopper cars.

We recognize that an important aspect of the Rail Transportation Policy is the protection of shippers from

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42 Under procedures specified in AAR Circular No. OT-5, use of a private car on a particular route requires prior approval by the originating carrier of the issuance of reporting marks for the car.

abuses of railroad market power.[43] LOSAC's argument, however, does not persuade us that rigid adherence to a historical-cost allowance standard is necessary in order to afford this protection.

First, we disagree that the OT-5 certification process has been shown to have any bearing on the ability of market forces to influence allowance levels. The act of a railroad in withholding OT-5 certification merely reflects a lack of need by that railroad for additional cars or a refusal to pay an allowance level that the carrier considers too high in relation to market conditions. As this OT-5 authority is exercised by individual railroads, we see no basis to consider it a *per se* abuse of market power. Moreover, we note that the railroads have offered to grant unlimited access to private cars if the car owners will accept market-based commpensation. No. 36169, *Shippers Committee, OT-5 v. Ann Arbor Ry.*, status report on negotiations filed July 6, 1987.

Second, the allowance caps and dual rate scales of which LOSAC complains have been the acts of individual railroads. No evidence has been introduced to support LOSAC's suggestion that the largest railroads are fixing allowances among themselves.

Finally, Commission scrutiny of individual railroad allowances under all the factors set forth in §11122 is still available. If particular instances of railroad abuse of market power do occur, individual private car owners are not without a remedy.

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43 The following policy declarations of §10101 a exemplify this aspect: *(6) To maintain reasonable rates where there is an absence of effective competition . . .; [and] (13) to . . . avoid undue concentrations of market power . . .*

VII. CONCLUSIONS

We conclude that the railroads' refusal to update covered hopper allowances under the 1980 COC/LOSAC formula after 1981, their publication of tariffs with specified upper limits on covered hopper allowances, and their publication of dual rate scales with differentials less than owners'-cost-based allowances are not shown to be unlawful under 49 U.S.C. §11122 or to be unreasonable practices under 49 U.S.C. §10701(a), given the market conditions reflected on this record.

For the same reason that we reject LOSAC's challenge to existing covered hopper allowances, we decline to prescribe covered hopper allowances for the future. To require rigid adherence to a uniform, nationwide formula for the future would elevate the cost-of-ownership factor above all the other factors specified by §11122, and would deprive individual railroads of the freedom to adjust allowance levels to prevailing market conditions. Although we are declining to prescribe a uniform system of car allowances, shippers and car owners who believe that a carrier or carriers have forced them to supply cars for unreasonably low compensation can seek prescription to remedy a specific problem.[44]

Having rejected the proposition that uniform nationwide allowances should be adopted and must conform to historical ownership costs even during a car surplus, we have fully disposed of the complaint. LOSAC has made no effort to show that specific allowances are unlawful under any stand-

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44 *See Bud Antle, Inc. v. United States*, 593 F.2d 865, 873 (9th Cir. 1979). [The Commission is authorized to determine the reasonableness of an allowance and award reparations to compensate an owner for services, provided the allowance was inadequate, or none had been published by the carrier. It can also require publication of an allowance prospectively (id., 876)]. If a carrier is abusing a particular shipper or car owner by unreasonably low allowances, the Commission has ample power to give effective relief.

ard that takes into account market conditions as they relate to all of the statutory factors.

We have indicated in discussing the record that the railroads' covered hopper allowances do not appear to be out of line when the railroads' own costs of providing cars are considered. The level of these costs, which will vary with the market conditions, would appear to be highly relevant information in any future case where the lawfulness of a particular allowance is challenged. Nonetheless, what we have said in this decision will not preclude an argument in a future case that an allowance should be higher (or lower) than a railroad's current car supply cost. We merely hold here that an argument concerning the lawfulness of allowances must reflect all factors in §11122, not just historical car ownership cost.

This decision will not significantly affect either the quality of the human environment or energy conservation.

VICE CHAIRMAN LAMBOLEY, dissenting in part:

I believe that the Commission should have exercised its discretion under §11122[45] to establish uniform allowances for covered hopper cars.

This proceeding represents the result of a mission failed by the parties. The parties have had a longstanding relationship which includes negotiation of agreements by which the shippers and the carriers achieve some balance of their

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45 49 U.S.C. §11122.

respective interests in the marketplace. The LOSAC group and the carriers have reached agreements in 1972 and in 1980; the latter of which included a provision for updating which seemed to recognize the dynamics of the market. However, current negotiations for updating amendment of the 1980 agreement have broken down, placing the matter before us.[46]

Since the parties have been unable to agree, I believe it is incumbent that the Commission, under the applicable standards, act to resolve the controversy.

Section 11122 provides for consideration of various factors in car allowance determinations. While the criteria question is answered by reference to §11122, the obligation question arises in §11122.[47] The obligation to provide cars for purposes of transportation is a part of §11121's common carrier obligation. From that proposition flows the option that the carrier has the opportunity either to provide the cars under its own ownership, or from some other third party source, be it a shipper, other carrier, or some other arrangement.

In the absence of the carrier's election to provide cars, it is acknowledged there is need and propriety for the third parties to provide cars. Indeed for a period of time, the LO cars were not available, and there was a car shortage. The market responded by having third parties make the investment. It is fair to say that if the market responds in that

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46 Whether the 1980 agreement remains binding is not clear. The fact that the Commission did not approve the agreement under §10713 stems directly from the fact the Commission indicated previously that *its* approval of such agreements was *not* necessary and, consequently, our approval or disapproval may not have been a needed action for the efficiency, the effectiveness, and the nature of the obligation to become binding.

47 49 U.S.C. §11121.

fashion, there is a reciprocal obligation then for carriers to pay for the use of those cars.

It is obvious that the market will go through cycles. As to car supply there will be times of car shortages, and of car surpluses. There are going to be economic and demand cycles, particularly for the commodity traffic utilizing this type of shipping container.

It seems to me we should take a long-term view, and not merely a short-term view. Failing that, we may well be here again struggling with the problem in another context. For example, the carriers may be here alleging exorbitant allowance requests, or a collective holding back to achieve a position in time of car shortage. Such an argument may very well have merit. Certainly it affects the ability to move that commodity, and shippers may have to pay such charges in their rate structure. Those circumstances appear to be the converse of the situation now raised by LOSAC in this time of surplus. Cycles come and go, and we should be sensitive to that.

We previously indicated in another case that it wasn't necessary to come to the Commission for approval of these arrangements unless the issue of lawfulness was present. Here, no one has raised any issue of lawfulness. Apparently the parties have at least operated in conjunction with that principle and came to the bargaining table in good faith. Consistent with that precedent, they reached an agreement, which they implemented in certain respects. They acted as if there was some kind of binding arrangement. If for nothing more than equitable estoppel considerations, the parties seemed to appreciate the nature and extent of their agreement.

Section 11122 is not the only provision applicable to prescription. Section 10706(a)(5)[48] has direct bearing on this case. As stated, the parties have reached agreements in the past, as late as 1980. They did so under the approved arrangements of the Commission which authorize shipper and carrier groups to negotiate. Section 10706(a)(5)(B) provides that when the negotiations break down, either party can come to the Commission for relief. At that point it is up to the Commission to set the terms and conditions for such allowances. The current situation presents just such a case.

At an oral argument LOSAC narrowly argued "do exactly as we propose," and the carriers simply argued that we "do nothing." Somewhere inbetween reposes our obligation. If we believe that LOSAC has unduly restricted the interpretation appropriate for §11122 and dismiss, what do we accomplish? If LOSAC's complaint is denied for the failure of its pleading that does not mean that LOSAC does not or could not otherwise fashion a claim for relief under other statutes. LOSAC could return and argue, as it does in part now, that the agreement it has with the carriers is being avoided and that is an unreasonable practice, or particularly that §10706(a)(5)(B) requires prescription of allowances by the Commission. I fail to appreciate a "dismissal and do nothing" approach. We have already had three cases in the Suspension Board in which we have denied relief to LOSAC. We have not indicated in any of those three suspension cases what we use as criteria in examining these cases. We are apparently unwilling to do so now.

If we reject the very narrow LOSAC interpretative approach, i.e., the cost of investment, and hold that an all-factor consideration is appropriate, we are left with the agency responsibility to determine whether or not the allowances, the caps and the differentials are themselves consistent with

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48 49 U.S.C. §10706(a)(5).

the provisions of the all-factor approach under §11122. The fact remains that, subject to appropriate statute of limitations, LOSAC can refile tomorrow, with a restructured that complaint alleging an all-factor basis under §11122, requesting relief under §10706(a)(5)(B). The matter has not been resolved and the Commission may again be involved in the same dispute resolution absent prescription.

COMMISSIONER SIMMONS, dissenting in part:

I would have exercised the Commission's authority to establish allowances for covered hopper cars. When the issue is squarely before us as in this proceeding, the Commission has an obligation to eliminate uncertainty and provide some guidance to parties concerning the standards which will govern car allowances in the future. The majority's refusal to embark on this task may have limited adverse effects during the present situation of oversupply. If car shortages develop in the future, however, the willingness of shippers and investors to acquire cars will certainly be restrained by the absence of any Commission guidelines on compensation for use of these cars. Thus, in my view the refusal to establish allowances in this proceeding is short-sighted and not in the public interest.

It is ordered:

1. The complaint is dismissed.
2. This decision is effective on August 31, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley and Commissioner Simmons dissented in part with separate expressions.

APPENDIX

Changes in Mileage Allowances on Private Covered Hopper Cars Since 1949

DATE EFFECTIVE	ALLOWANCE PER LOADED MILE (cents)	TARIFF REFERENCE
05/01/49	4.5	Not Available
07/01/52	6.4	Not Available
09/01/57	7.4	Not Available
09/01/58	8.0	Not Available
01/01/60	9.0	Not Available
09/01/63	11.0	Not Available
05/01/73	13.0	7-D, ICC H-60
03/01/76	13.0-15.0	7-F, ICC H-68, Supp. 5
02/01/77	11.0-18.0	7-F, ICC H.68, Supp. 24
07/01/78	11.0-24.0	7-F, ICC H-68, Supp. 46
10/01/80	7.76-25.99	6007-G, Supp. 20
07/01/81	7.76-33.14	6007-G, Supp. 38
11/01/81	9.68-39.45	6007-G, Supp. 45
07/01/82	9.68-54.56	6007-H, Supp. 5
02/01/83	10.3-57.9	6007-H, Supp. 24
08/01/83	9.7-54.6	6007-H, Supp. 24

NOTE: The general method of publication of allowances prior to October 1, 1980, was on the basis of cents per mile, loaded and empty. However, many carriers during this period went individually to a loaded-mile-only basis. Only the loaded mile rate (twice the loaded-plus-empty mile rate) is shown above. The COC/LOSAC agreement, which was implemented October 1, 1980, provided only for allowances on a loaded-mile basis.

Source: Complainant's verified statement no. 1, appendix B.

APPENDIX C

STATUTES INVOLVED

49 U.S.C. §11122, as it presently reads:

(a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include –

(1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;

(2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and

(3) sanctions for nonobservance.

(b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car and other factors that affect the adequacy of the national freight car supply.

49 U.S.C. §1(14)(a), as Amended
May 26, 1966, Pub. L. 89-430 §1, 80 Stat. 168

(14)(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common car-

riers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

49 U.S.C. §1(14)(a), as Amended
February 5, 1976, Pub. L. 94-120, 90 Stat. 46[1]

(14)(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of any interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the pensalties or other sanctions for nonobservance of such rules, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, con-

1 This is the statute "replaced" by the revised §11122.

tribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive elements applicable to any type of freight car in the Commission finds that the supply of such type of freight car if adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

49 U.S.C. §10505

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle –

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

Section 3(a) of the Act of October 17, 1978
Pub. L. 95-473, 92 Stat. 142, Revising and
Recodifying the Interstate Commerce Act:

Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced . . .

APPENDIX D

LEGISLATIVE DEVELOPMENT OF 49 U.S.C. §11122

Title 49 U.S.C. §11122 currently provides:

> (a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include –
>
> (1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;
>
> (2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and
>
> (3) sanctions for nonobservance.
>
> (b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

This provision is derived from what was originally enacted by the Esch Car Service Act, May 29, 1917, ch. 23, 40 Stat. 101, which, in pertinent part, provided:

> The Commission shall, after hearing, on a complaint or upon its own initiative without complaint, establish

> reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules.

Section 402 of the Transportation Act of 1920, February 28, 1920, ch. 91, 41 Stat. 476, made that provision section 1(14) of the Interstate Commerce Act and amended it to provide:

> (14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.[1]

The Motor Carrier Act of 1935, August 9, 1935, ch. 498, 49 Stat. 543, changed the reference in section 1(14) from "this Act" to "this part" pursuant to the following provision:

> That the Interstate Commerce Act, as amended, herein referred to as "Part I," is hereby amended by inserting at the beginning thereof the caption "part I," and by substituting for the words "this Act," wherever they occur, the words "this part," but such part I may continue to be cited as the "Interstate Commerce Act," and said Interstate Commerce Act is hereby further amended by adding the following part II.

Section 4(a) of the Transportation Act of 1940, September 18, 1940, ch. 722, 54 Stat. 901, redesignated section 1(14) as section 1(14)(a) and amended it to provide:

---

1 Underlining identifies newly-added provisions.

(14)(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

Section 1(14)(a) was further amended on May 26, 1966, in Pub.L. 89-430, §1, 80 Stat. 168, to provide:

(14)(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rulings, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will

provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commissionn finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Section 212(a) of the Railroad Revitalization and Regulatory Reform Act, February 5, 1976, Pub.L. 94-120, 90 Stat. 46, amended section 1(14)(a) to read as follows:

(14)(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight cars, and to other factors affecting the adequacy of the national

> freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

As part of a comprehensive revision and recodification of the Interstate Commerce Act, section 1(14)(a) was restated, without substantive change, in Pub.L. 95-473, October 17, 1978, 92 Stat. 1421, as 49 U.S.C. §11122(a) and (b), to read as follows:

> (a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include –
>
> (1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle.
>
> (2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the

locomotive, freight car, or other vehicle, whether or not owned by the rail carrier, shipper, or third person; and

(3) sanctions for nonobservance.

(b)(1) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

(2) The Commission may increase a rate of compensation determined under paragraph (1) of this subsection by an incentive element only when the Commission finds that the supply of a type of freight car is inadequate and an incentive element will compensate freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and national defense. The Commission may exempt that incentive element from the compensation to be paid by a carrier or group of carriers when the Commission finds that exemption is in the national interest.

Section 224(a) of the Staggers Rail Act of 1980, Pub.L. 96-448, Title II, October 14, 1980, 94 Stat. 1929, effected the most recent change in 49 U.S.C. §11122, repealing paragrph (b)(2) thereof, deleting (1) in subsection (b), and leaving the entire section in the form set forth at the beginning of this appendix.

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1486 **September Term, 1988**

Lo Shippers Action Committee,

Petitioner

v.

Interstate Commerce Commission and United States of America

Respondents

United States Court of Appeals
For the District of Columbia Circuit

FILED NOV 18 1988

CONSTANCE L. DUPRE
CLERK

BEFORE: Mikva and Sentelle, Circuit Judges and Palmieri*, U. S. Senior District Judge for the Southern District of New York

ORDER

Upon consideration of petitioner's petition for rehearing filed November 4, 1988, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: Robert A. Bonner/CB

Robert A. Bonner
Deputy Clerk

*Sitting by designation pursuant to 28 U.S.C. § 294(d)

Supreme Court, U.S.
FILED
MAY 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1388

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LO SHIPPERS ACTION COMMITTEE,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT RAILROADS AND ASSOCIATION OF AMERICAN RAILROADS IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether under 49 U.S.C. § 11122 compensation paid by railroads for use of freight cars must invariably equal or exceed amounts necessary to recoup the full cost of owning and maintaining the cars plus a guaranteed return on investment, even when such compensation would conflict with other statutory objectives and harm national transportation interests.

2. Whether a statute providing that the ICC's regulations "may" include compensation for the use of freight cars compels the ICC to establish such regulations on demand.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1388

LO SHIPPERS ACTION COMMITTEE,
Petitioner,

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THE UNITED STATES OF AMERICA,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT RAILROADS AND ASSOCIATION OF AMERICAN RAILROADS IN OPPOSITION TO PETITION

The respondent railroads listed in Appendix A and the Association of American Railroads, intervenors in the court of appeals below, submit this brief in opposition to the petition for a writ of certiorari filed by LO Shippers Action Committee ("LOSAC").[1]

STATEMENT OF THE CASE

When a railroad transports freight in cars it does not own, it recognizes the value of using the cars in various ways. Traditionally, railroads have paid for the use of

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[1] Appendix A also provides the information required under Rule 28.1.

cars owned by other railroads by making "per diem" payments and for the use of cars owned by shippers and other investors (so-called "private cars") by offering "allowances" to the provider of the car. This case involves the allowances paid by railroads for the use of one type of private car, known as a "covered hopper," which is used to transport bulk commodities such as grain and fertilizer.

1. *The applicable statutes.* Section 11122 of the Interstate Commerce Act (the "Act") authorizes the ICC to adopt car service regulations, including regulations concerning compensation to be paid by railroads for the use of rail cars. See Pet. Cl. The ICC is not required to prescribe compensation under this section but "may" do so if it is able to find, as required by subsection 11122(a), that such regulations will advance statutory goals of adequate equipment acquisition and efficient utilization. 49 U.S.C. § 11122(a).

If the ICC elects to prescribe compensation regulations, subsection (b) requires the Commission to weigh a number of factors in determining the amount of compensation. The first sentence of that subsection specifies several cost factors, such as repair and maintenance costs. The second sentence requires the ICC to consider other transportation and market factors, including the "adequacy of the national freight car supply." 49 U.S.C. § 11122(b).[2]

Another important provision of the Act is also involved. Whenever the ICC oversees the rail industry, its decisions must further the objectives of the National Rail Transportation Policy. 49 U.S.C. § 10101a (set forth in

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[2] Subsection (b) does not appear to govern railroad allowances until the ICC adopts car service regulations. Neither the ICC nor the court of appeals had occasion to reach the railroads' contention that the provision did not apply in this case, where no regulations had been adopted.

Appendix B.)[3] This policy requires the ICC to "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" and to "minimize the need for Federal regulatory control." 49 U.S.C. § 10101a(1), (2).

2. *Compensation for the use of private covered hoppers.* The ICC has never prescribed allowances that railroads must pay for using private covered hopper cars. Pet. B3. Even during the decades of intensive federal regulation of rail transportation, those allowances were instead established collectively by railroads, usually after negotiations with groups of car owners such as LOSAC. Because regulated railroad rates for moving freight were generally uniform over competing routes and based on average costs,[4] allowances were also uniform throughout the nation and based on average costs, so that similarly situated shippers would pay identical net charges.

The last of the collective allowance regimes for covered hopper cars, modeled on similarly structured compensation systems for other types of cars, was adopted by the railroads in 1980 after negotiations with LOSAC. Soon afterwards, however, the greatest rail car surplus since the Depression developed throughout the nation, exposing "serious flaws" in those rigid compensation schemes.[5] Most seriously, the compensation formulae caused car rental payments to increase as the demand for and use of cars declined. This startlingly inefficient inversion of the normal rules of supply and demand had especially

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[3] See 49 U.S.C. § 10101; *Coal Exporters Ass'n* v. *United States*, 745 F.2d 76, 94 n.22 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985).

[4] *E.g.*, I. Sharfman, *The Interstate Commerce Commission*, Part III-B (1936).

[5] *Investigation of Tank Car Allowance System*, Ex Parte No. 328 (unpublished decision served Sept. 20, 1985), p. 3. Nine copies of all unpublished ICC decisions cited herein have been lodged with the Clerk of the Court.

perverse effects on covered hopper allowances, because thousands of those cars had been idled by President Carter's embargo on grain sales to the Soviet Union. The ICC blocked irrational increases in the compensation that it had prescribed for other types of cars,[6] and the railroads took the parallel step of declining to increase allowance payments for covered hoppers.

At the same time, traditional car compensation regimes were becoming increasingly anachronistic in the wake of Congress' partial deregulation of the rail industry, which it launched in the "4-R Act" of 1976[7] and expanded in the Staggers Rail Act of 1980.[8] Concluding that federal regulation had contributed heavily to the financial deterioration of the industry and that most rail traffic was subject to competition,[9] Congress eliminated regulation of most rail freight rates, reduced the scope of collective ratemaking, and introduced the railroads to the forces of competition faced every day by other businesses. As a result of these legislative reforms, railroads were compelled to set freight rates individually, in response to competitors' rates.

Freight rates determined by market forces could not easily accommodate uniform national allowances based on average costs. Accordingly, the railroads ceased collective establishment of uniform allowances for covered hoppers in 1983 and all changes in allowances since then have been made by individual railroads (Pet. B4), often in contracts or informal agreements with individual ship-

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[6] *E.g., Investigation of Tank Car Allowance System,* Ex Parte No. 328 (unpublished decision served Nov. 4, 1983); *Suspension of Car Hire Updates,* Ex Parte No. 334 (Sub-No. 7) (unpublished decision served Jan. 2, 1986).

[7] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31.

[8] Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.

[9] See *id.* § 2, 94 Stat. 1895, 1896.

pers. Market pressures on rail rates were especially intense in grain transportation, as farmers facing source competition from around the world were forced to seek lower transport costs. Lower rail rates could be achieved only by reducing allowances to market levels, and many grain shippers—including LOSAC members—supported the necessary reductions.[10]

3. *The proceedings below.* LOSAC filed a complaint at the ICC alleging violations of the Act and requesting increased allowances and damages. LOSAC's case was framed narrowly, premised on its arguments that subsection 11122(b) should be read in isolation, that it compels the ICC to prescribe allowances, and that it requires allowances sufficient at all times to guarantee full recovery of the costs of buying and maintaining the existing car fleet, even when the quantity of cars purchased is excessive and other statutory factors favor lower allowances. Because LOSAC contended that the Act required allowances to be doubled in the midst of a covered hopper surplus of historic proportions, the amounts in dispute were substantial.

The ICC held unanimously that it has discretion to determine whether to prescribe allowances. Pet. B15. The Commission also unanimously decided that, if it prescribes allowances, section 11122 requires it to consider factors beyond ownership costs and permits compensation to fluctuate above and below the full cost recovery level,[11]

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[10] The ICC found that grain-hauling railroads generally had reduced freight rates more than they reduced allowances, so that savings were passed directly to shippers. Pet. B25.

[11] "Full cost recovery" is the level of compensation that recoups the original costs of all cars then in service, plus repair and maintenance costs of those cars and a guaranteed return on the capital invested (a guarantee not enjoyed by the railroads when they buy cars or provide transportation). Under normal circumstances, investors in freight cars can expect to recover the costs of providing cars that are needed by shippers for rail transportation, even

depending on the adequacy of national car supply and other transportation policies. *Id.* at B15-16. The agency found that the allowances sought by LOSAC would cause railroad freight rates to rise, reduce the availability of affordable transportation, and discriminate in favor of LOSAC members, all of whom possessed covered hoppers, and against other shippers who did not. *Id.* at B11-14. Holding that LOSAC had failed to demonstrate that any allowance was unlawful (*id.* at B21, B30-31), the ICC dismissed LOSAC's complaint. A majority of the Commissioners saw no reason to enter a prescription for the future.[12]

The ICC's decision was unanimously affirmed in every respect by a panel of the United States Court of Appeals for the District of Columbia Circuit (Circuit Judges Mikva and Sentelle and District Judge Palmieri, sitting by designation). The court of appeals rejected LOSAC's claim that the ICC must prescribe allowances on demand, and it found no merit in LOSAC's argument that section 11122 forbids below-cost allowances. The court concluded that "Congress clearly granted the ICC discretion as to the precise subject at issue here" and it found the ICC's interpretation of section 11122 to be "more than reasonable." Pet. A12.[13] LOSAC's petition for rehearing and suggestion for rehearing *en banc* were denied.

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though rentals may vary above or below the cost recovery level from time to time. LOSAC contends, however, that allowances may never fluctuate below the full cost recovery level and must ensure recovery of all costs, even for unwarranted investments in unneeded cars.

[12] Two Commissioners would have exercised the ICC's discretion to adopt new car service regulations. See Pet. B31-35.

[13] Accordingly, this case is unlike those raising concerns that the D.C. Circuit and the ICC "have rather divergent views of the mandate of the Staggers Act and the nature of the Commission's task thereunder." *ICC* v. *Brae Corp.*, 471 U.S. 1069, 1071 (1985) (Justice White, dissenting).

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Decision Does Not Present a Federal Question Requiring Supreme Court Review and Does Not Conflict With Precedent of This Court or Any Other Court of Appeals.

The issue in this case is whether section 11122 compels the ICC to prescribe allowances at levels that "guarantee full-cost recovery to car-providing shippers" (Pet. A12) when such allowances would conflict with other statutory requirements and would adversely affect the national transportation system. This is not a difficult question of statutory construction requiring attention from the nation's highest court. Nothing in the language of the statute requires the ICC to set allowances at or above the full cost recovery level. Instead, the statute in terms gives the ICC discretion to prescribe allowances and, should the agency choose to prescribe, instructs it to consider car supply conditions and transportation concerns other than costs.

The court of appeals' parsing of section 11122 cannot be questioned. The court confirmed that the ICC's discretion is established by subsection 11122(a), which provides that ICC regulations "may" include car compensation. Pet. A10. Turning to subsection 11122(b), the court observed that one sentence requires the ICC to consider certain cost factors and the next sentence requires it to consider "market factors," such as the adequacy of car supply. *Id.* at A12. As the court of appeals held, each sentence speaks with the imperative "shall" and Congress provided no ordering priorities, leaving the determination of policy to the ICC. *Id.*[14] Where "Congress has not directly addressed the precise question at issue," an agency's "permissible construction of the statute"

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[14] A traditional function of a specialized administrative agency such as the ICC is to weigh competing statutory requirements in technical areas of agency expertise. See, *e.g.*, *Baltimore & O. R.R.* v. *United States*, 345 U.S. 146, 150 (1953).

should not be disturbed. *Chevron U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The court found the agency's construction to be "more than reasonable." Pet. A12.

The construction of the statute unanimously adopted by the Commission and endorsed by the D.C. Circuit is in complete harmony with the decision of the only other court of appeals to construe section 11122. In *Consolidated Rail Corp.* v. *United States*, 619 F.2d 988, 996 (3rd Cir. 1980), the Third Circuit held that the Commission must weigh the non-cost factors listed in the second sentence of subsection 11122(b), including "factors affecting the adequacy of the national freight car supply," when it regulates car compensation. It may not consider costs alone. The D.C. Circuit takes the same view of what the statute requires.[15]

This construction of the statute follows an unbroken chain of agency rulings since 1980 that permit car compensation under subsection 11122(b) "to fall below the level that would be necessary to cover full ownership costs." *Zone of Reasonableness for Car Hire Charges*, 364 I.C.C. 299, 305 (1980). The ICC has consistently rejected demands by car owners for a "guarantee concerning car compensation or the return on their investment." [16] The present decision conforms to the agency's uniform and reasonable precedent in a technical area committed by Congress to the agency's expertise.[17]

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[15] Accord, *Brae Corp.* v. *United States*, 740 F.2d 1023, 1059 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1069 (1985).

[16] *Exemption From Regulation—Boxcar Traffic*, 367 I.C.C. 746, 760-61 (1983), *aff'd in part and rev'd in part sub nom. Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1069 (1985). See also *Suspension of Car Hire Updates*, Ex Parte No. 334 (Sub-No. 7) (unpublished decision served Jan. 2, 1986), p. 1. (Section 11122 "does not require that we prescribe full recovery of ownership costs during periods when demand for cars is weak.")

[17] LOSAC invokes the spector of "severe car shortages" and even a threat to national defense if this construction of the Act is upheld

While ignoring the unanimity of judicial and agency decisions construing section 11122, LOSAC claims that the decision below conflicts with a 1940 decision of this Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422. That decision did not even mention the predecessor of section 11122 but instead involved the ICC's power to prevent excessive allowances and other rebates under the Elkins Act. In that case, the railroads had not filed tariffs providing for payment of allowances directly to shippers as required by former section 15(13) (now 49 U.S.C. § 10747), and, in *dictum* quoted by LOSAC (Pet. 22-23), the Court observed that the shipper could file a complaint with the ICC "to the end" that a tariff be established. The decision says nothing about any agency duty under a different section of the Act (section 11122) to set minimum allowances, nor does it require the ICC to grant relief when a complaint has not been substantiated. There is no conflict or even tension between this Court's opinion in *El Dorado* and the decision below.

II. Congress Has Rejected LOSAC's Argument That Car Compensation Can Never Fall Below the Cost Recovery Level.

LOSAC's challenge stands or falls on its insistence that subsection 11122(b) works only one way, permitting car compensation to exceed the cost recovery level but forbidding lower compensation, regardless of the impact on car supply, other statutory considerations, or national rail transportation policy. LOSAC's argument is not based on the language of the statute but on legislative history that has been superseded by subsequent amend-

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(Pet. 8-10), but its assertion that "no one would have acquired cars" knowing that allowances could fall below the full cost recovery level (Pet. 18) is belied by historical facts. The agency found that the car surplus of the 1980s was created while allowances were far below those demanded by LOSAC and that many allowances had doubled since those acquisitions were made. Pet. B19-20.

ments to the statute. LOSAC's petition ignores the later and extensive legislative history that bears directly upon the statutory language at issue here.

Section 11122 was amended in 1980. As both the court of appeals and the ICC explained, the legislative history of that amendment compels the construction adopted by the ICC. See Pet. A12-13, B17-18. Congress expressly ratified the same ICC construction of the statute challenged here by endorsing a flexible car hire rule proposed by the ICC. *Id.* A13.[18] Moreover, in discussing section 11122, Congress described its expectation that compensation could fluctuate in response to car supply and directed the ICC to allow "marketplace decisions" to govern compensation.[19] This legislative history is determinative of the meaning of section 11122.[20]

Ignoring these specific declarations of the will of Congress, LOSAC focuses instead on Congress' decision not to enact a proposal that would have completely deregu-

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[18] Shortly before the passage of the Staggers Act, the ICC had proposed that the railroads be authorized under section 11122 to adopt "flexible" car hire payments above or below the cost recovery level. *Order to Show Cause for Granting Railroads Flexibility in Setting Per Diem Levels*, 45 Fed. Reg. 41,469 (1980); *Order Granting Railroads Flexibility in Setting Per Diem Levels*, 364 I.C.C. 107, 109 (1980). Congress endorsed this approach, calling upon the ICC to continue "to examine means (such as flexible car hire) of making basic car hire more responsive to market forces . . . ." H.R. Rep. No. 1430 [Conf. Rep.], 96th Cong., 2d Sess. 117 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4149.

[19] *Id.* at 118, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4150.

[20] Before the ICC and the court below, LOSAC resorted to after-the-fact complaints by two congressmen that their views were not adequately considered in the conference committee report on the Staggers Act. Such complaints cannot cast doubt on a report debated by Congress (126 Cong. Rec. 27472-3 (1980)) and approved after consideration of objections (*id.* at 28428, 28434), and the complaints did not pertain to section 11122 in any event.

lated car compensation. Pet. 19-21. Congressional inaction normally does not constitute an expression of legislative intent.[21] That is especially clear in this case. Congress' failure to eliminate the Commission's authority over compensation clearly cannot mean that the agency's authority should be interpreted in a manner flatly inconsistent with express statements of Congress' intent.[22]

LOSAC argues that the court of appeals should have focused on the language of the statute prior to a 1978 recodification.[23] Even if the amendment of the section two years later is disregarded, the predecessor provision, former 49 U.S.C. § 1(14)(a), does not aid LOSAC. Like section 11122, it gave the Commission discretion to adopt car service regulations (the Commission "may, upon complaint of any interested party or upon its own initiative . . . establish . . . regulations") and, in two separate sentences, required the Commission to weigh both cost and non-cost factors in any compensation regulations it might adopt. Pet. C3. In that version, the non-cost factors were listed before the cost-related factors, dispelling any notion that the present order of sentences is significant.

Ultimately, LOSAC's challenge is based on the 1966 legislative history of section 1(14)(a). But Congress' intent in 1966 is irrelevant. Section 1(14)(a) was thoroughly revised ten years later and, after recodifica-

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[21] *United States* v. *Price*, 361 U.S. 304, 310-11 (1960) ("non-action by Congress affords the most dubious foundation for drawing positive inferences").

[22] Moreover, Congress simultaneously rejected an amendment that could have required the agency to prescribe car compensation during a car shortage—an amendment that would be unnecessary under LOSAC's view of the statute. See H.R. 7235, § 307(b), *reprinted in* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 17 (1980).

[23] The parties agree that this 1978 recodification of the Act was not intended to change its substance. Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978).

tion, was amended again in 1980. The language that LOSAC claims permitted only cost-based allowances or higher "incentive" allowances (Pet. 13) was eliminated in 1976, and the incentive provision was scrapped in 1980.[24]

III. The Court of Appeals Correctly Found That the ICC is Not Obligated to Prescribe Covered Hopper Allowances on Demand.

LOSAC's insistence that the ICC must prescribe allowances on demand is impossible to square with the language of the statute. Observing that "shall" is the language of command (Pet. 24), LOSAC ignores the fact that the statute says that the ICC's regulations "may" include compensation. 49 U.S.C. § 11122(a). The court of appeals addressed LOSAC's contention at length and we commend its analysis. See Pet. A10-12.

Nothing in section 11122 or any other provision of the Act alters the usual rule that complainants must prove that they are entitled to relief under the Act.[25] In this instance, the ICC correctly found that LOSAC had made "no effort" to show that allowances were unlawful on the basis of all the factors to be considered under section 11122. Pet. B30-31. The ICC accordingly had no duty to provide relief.

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[24] Moreover, LOSAC misreads the 1966 legislative history. While Congress acted then to address a severe car shortage, its objective was to expand—not to contract—the ICC's flexibility. The 1966 version of section 1(14)(a) gave the ICC the power to adopt "incentive" car compensation above the cost-recovery level, because an earlier district court decision had suggested that such compensation might be impermissible. See S. Rep. No. 386, 89th Cong., 1st Sess. 7, 16-17 (1965); H.R. Rep. No. 1183, 89th Cong., 1st Sess. 3 (1965), *reprinted in* 1966 U.S. Code Cong. & Ad. News 2227, 2229; *Palmer* v. *United States*, 75 F. Supp. 63 (D.D.C. 1947).

[25] See, *e.g.*, *Louisville & N. R.R.* v. *ICC*, 238 U.S. 1 (1915); *Potomac Elec. Power Co.* v. *Consolidated Rail Corp.*, 362 I.C.C. 169, 185 (1980).

Nor does the ICC's discretionary decision not to prescribe allowances constitute "de facto" deregulation contravening the requirements of 49 U.S.C. § 10505. Pet. 25-26. This case was an exercise in regulation. Although LOSAC did not prevail, the ICC exercised its jurisdiction and made a reasoned decision not to prescribe allowances in this case. Its decision also contemplated future complaints by parties able to offer a more persuasive showing that allowances are inadequate (Pet. B31), and the agency unquestionably retains the power to prescribe allowances in the future. See Pet. A14. That is not deregulation.

CONCLUSION

The petition for a writ of certiorari should be denied.

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APPENDICES

APPENDIX A

1. The respondents submitting this brief are:

Association of American Railroads
Atchison, Topeka and Santa Fe Railway Company, The
Burlington Northern Railroad Company
Chicago & North Western Transportation Company
Consolidated Rail Corporation
CSX Transportation, Inc.
Denver and Rio Grande Western Railroad Company, The
Illinois Central Railroad Company
Kansas City Southern Railway Company, The
Norfolk & Western Railway Company
Southern Pacific Transportation Company
Southern Railway Company
Soo Line Railroad Company
Union Pacific Railroad Company

2. The names of parent companies and non-wholly owned subsidiaries or affiliates of the respondent railroads are:

Santa Fe Southern Pacific Corp. is the parent of respondent THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY. Subsidiaries and affiliates are:

Central California Traction Company
Santa Fe Energy Partners, L.P.
Santa Fe Natural Resources, Inc.
Santa Fe Pacific Pipeline Partners, L.P.
Southern Pacific Company
Sunset Railway Company
Trailer Train Company

Burlington Northern Inc. is the parent of respondent BURLINGTON NORTHERN RAILROAD COMPANY. Subsidiaries and affiliates are:

Belt Railway Company of Chicago, The
Camas Praire Railroad Company

Davenport, Rock Island and North Western Railway Company
Denver Union Terminal Railway Company, The
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Trailer Train Company
Wichita Union Terminal Railway Company, The

CNW Corporation is the parent of respondent CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY. Subsidiaries and affiliates are:

Iowa Transfer Railway Company
Kansas City Terminal Railway Company
MT Properties
Peoria and Pekin Union Railway Company
Railbox Company
Railroad Association Insurance, Ltd.
Trailer Train Company
Transportation and Railroad Assurance Company, Ltd.

Respondent CONSOLIDATED RAIL CORPORATION has no corporate parent. Subsidiaries and affiliates are:

Akron and Barberton Belt Railroad Company
Albany Port Railroad Corporation
American Casualty Excess Insurance, Ltd.
Belt Railway Company of Chicago, The
Calumet Western Railway Company
Chicago and Western Indiana Railway Company
Indiana Harbor Belt Railroad Company
Lakefront Dock & Railroad Terminal Company
Monongahela Railway Company
Nicholas, Fayette & Greenbrier Railroad Company

Pennsylvania Truck Lines, Inc.
Peoria & Pekin Union Railway Company
Pittsburgh, Chartiers & Youghiogheny Railway Company
Railroad Association Insurance, Ltd.
St. Lawrence and Adirondack Railway Company, Inc.
Trailer Train Company
Transportation Data Xchange

CSX Corporation is the parent of respondent CSX TRANSPORTATION, INC. Subsidiaries and affiliates are:

Akron and Barberton Belt Railroad Company, The
Akron Union Passenger Depot Company, The
Allegheny and Western Railway Company
Augusta and Summerville Railroad Company
Baltimore and Cumberland Valley Rail Road Extension Company, The
Baltimore and Philadelphia Railroad Company, The
Baronial Transportation Company
Beaver Street Tower Company
Belt Railway Company of Chicago
Central Florida Pipeline Corporation
Central Railroad Company of South Carolina, The
Central Transfer Railway and Storage Company, The
Chatham Terminal Company
Chicago and Western Indiana Railroad Company
Clearfield and Mahoning Railway Company
Cleveland Terminal & Valley Railroad Company
Country Wide Transport Services, Inc.
CSX Services, Inc.
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Delaware and Bound Brook Railroad Company
First Georgia Development Corporation
Home Avenue Railroad Company, The
Lakefront Dock and Railroad Terminal Company, The

Mid Allegheny Corporation
Monongahela Railway Company, The
Norfolk and Portsmouth Belt Line Railroad Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Richmond, Fredericksburg and Potomac Railroad Company
Richmond-Washington Company
Staten Island-Cranford, Inc.
Terminal Railroad Association of St. Louis
Trailer Train Company
Wesjax Development Company
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company
Yukon Pacific Corporation

The Anschutz Corporation is the parent of Rio Grande Industries, Inc., which in turn is the parent of respondents THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY and SOUTHERN PACIFIC TRANSPORTATION COMPANY. Subsidiaries and affiliates are:

St. Louis Southwestern Railway Company
SPTC Holding, Inc.
Trailer Train Company

Prospect Group, Inc. is the parent of Illinois Central Transportation Company, which in turn is the parent of respondent ILLINOIS CENTRAL RAILROAD COMPANY. Subsidiaries and affiliates are:

Belt Railway Company of Chicago
Blue Island Railroad Company
Chicago Intermodal Company
Co-op Oil Company
Dairy Cattle Congress, The
Digitech, Inc.
GM&O Land Company
Great Plain Supply Company

Kensington and Eastern Railroad Company
Mississippi Valley Corporation
Mississippi Export Railroad Company
Paducah & Illinois Railroad Company
Peabody Short Line Railroad
Peoria & Pekin Union Railroad Company
Pullman Company, The
South Chicago Railroad Company, The
Terminal Railroad Association of St. Louis
Trailer Train Company
Waterloo Railway Company
Wickes Companies, Inc.

Kansas City Southern Industries, Inc. is the parent of respondent THE KANSAS CITY SOUTHERN RAILWAY COMPANY. Subsidiaries and affiliates are:

ALC Communications
DST Systems, Inc.
First of Michigan Capital Corporation
Louisiana & Arkansas Railway Company
Williams Telecommunications Group, Inc.

Norfolk Southern Corporation is the parent of respondents NORFOLK & WESTERN RAILWAY COMPANY and SOUTHERN RAILWAY COMPANY. Subsidiaries and affiliates are:

Algers, Winslow and Western Railway Company
Atlantic and North Carolina Railroad Company
1575 Eye Street Associates (Limited Partnership)
High Point, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
North Carolina Midland Railroad Company, The
North Carolina Railroad Company, The
Richmond, Fredericksburg and Potomac Railroad Company
700 North Fairfax Street Limited Partnership
The South Western Rail Road Company

State University Railroad Company
Wabash Railroad Company
Wheeling and Lake Erie Railway Company, The
Yadkin Railroad Company

Respondent SOO LINE RAILROAD COMPANY is a subsidiary of Soo Line Corporation, 56 percent of whose stock is owned by Canadian Pacific Limited. Subsidiaries and affiliates are:

Algoma Steel Corporation, Limited, The
AMCA Holdings (U.K.) Limited
AMCA International Limited
American Reinforcing Inc.
Amtel Chimie et Plastiques
Arrendadora Korco, S.A. de C.V. (Mexico)
Bilsa, S.A.
Bomag Australia PTY Ltd.
Bomag-Nenck B.m.b.H.
Bomag S.A.F.
Brosses Osborn S.A.
Brushes International PLC (U.K.)
Brushes International do Brazil
Canada Line Agencies Limited, The
Canada Line Limited, The
Canada Line Services Limited, The
Canadian Pacific Enterprises Limited
Canadian Pacific Oil and Gas Norway A/S
CanPac Maritime Agencies Limited
Cascade Pipe Line Limited
Cherry Burrell Holdings Corporation
Cominco Ltd.
Compaloc
Corporate Foods Limited
Dandix, Inc. (U.S.A.)
Dendix Brushes Limited (U.K.)
Desa Industries (U.K.) Limited
Dominion Atlantic Railway Company, The
Dominion Bridge Sultzer, Inc.

Eastern Bakeries Limited
Energy Development (Management) Limited
Falt Towing Ltd.
Gem Power Brushes, Limited (U.K.)
Giddings & Lewis Foundation Inc.
Great Lakes Forest Products Limited
Greenex A/S
Hawaiian Western Steel Limited
Intrumentation Services, S.A.
Imodco International Inc.
KCL Leasing
Kingston and Pembroke Railway Company, The
Koering Leasing
Koering Leasing Partners
Kremzar Gold Mines Limited
Lake Champlain and St. Lawrence Junction Railway Company, The
Lake Erie and Northern Railway Company, The
Lake St. Joseph Iron Inc.
Litwin Arabia Ltd.
Litwin (U.K.) Limited
Manitoba and North Western Railway Company of Canada
Maple Shipping Company, (U.K.) Limited
Marathon Aviation Terminals Limited
Massawippi Valley Railway Company
Mayo Forest Products Ltd.
Montreal and Atlantic Railway Company, The
National Hardware Specialties Limited
Nippon Bomag C., Ltd. (Japan)
OTM Limited
Ontario and Quebec Railway Company
Orbs-Johnson Systems, Inc.
Osborn Foundry Machinery, Ltd.
Osborn International G.m.b.H. (W. Germany)
PanCanadian Petroleum Denmark A/S
PanCanadian Petroleum Limited
Pine Point Mines Limited

Pitt Street Developments Limited
Polytec S.A.R.L.
Princeton Gold Mines Limited
Ptarmigan Mines, Limited
Robison Mines Limited
Rycon Mines Limited
Societe Anonyme des Machines Osborn (France)
St. Lawrence and Ottawa Railway Company, The
Steep Rock Resources Inc.
Sunloch Mines Limited
Sunro Mines Limited (N.P.L.)
T.E.B.A. B.V.I.O. (The Netherlands)
Telsat Canada
Toronto, Grey and Bruce Railway Company
Toronto Terminals Railway Company, The
Trailer Train Company
Vestgron Mines Limited
Village Green Mall Ltd.
Vol Mines Limited
Webb Jarratt & Company Limited
Western Fabricators Inc.
Western Metal Products Inc.

Union Pacific Corporation is the parent of respondent UNION PACIFIC RAILROAD COMPANY. Subsidiaries and affiliates are:

Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Oklahoma Kansas and Texas Railroad Company
Overnite Transportation Company
Texas & Pacific Railway Company

APPENDIX B

49 U.S.C. § 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

(Added Pub. L. 96-448, Title I, § 101(a), Oct. 14, 1980, 94 Stat. 1897.)

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No. 88-1388

In the Supreme Court of the United States

OCTOBER TERM, 1988

LO SHIPPERS ACTION COMMITTEE, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 11122 of the Interstate Commerce Act, (49 U.S.C.), requires the Interstate Commerce Commission to prescribe nationwide railroad car hire allowances which guarantee that car owners fully recover their costs of ownership.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 857 F.2d 802 (D.C. Cir. 1988). The decision of the Interstate Commerce Commission is reported in *LO Shippers* v. *Aberdeen & Rockfish Ry.*, 4 I.C.C.2d 1 (Pet. App. B1 to B36).

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1988. A timely petition for rehearing was filed on November 4, 1988, and denied on November 18, 1988. The petition for certiorari was filed on February 16, 1989. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Railroads subject to the jurisdiction of the Interstate Commerce Commission (ICC) may provide common carrier service using their own cars, cars belonging to another railroad, or cars owned or leased by a shipper. When a railroad uses cars owned by another railroad for a revenue movement, it pays the owning railroad what is known as a per diem charge. When a railroad uses cars belonging to a shipper or some other non-rail owner, it provides compensation which is known as an allowance.

The Commission originally was given the power to regulate per diem charges and allowances by the Esch Car Service Act of 1917. That authority originally provided (Pet. App. D1 to D2):

> The Commission shall, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules.

Three years later, in the Transportation Act of 1920, the statute was amended in several respects. See Pet. App. D2. Most critical for present purposes was the substitution of the word "may" for the word "shall" in the opening clause of the statute. In succeeding years other amendments were adopted. For example, amendments adopted in 1966, during a time of serious car shortages, authorized the Commission to provide for "incentive" per diem charges in order to encourage car ownership. Pet. App. D3. Later in the Staggers Rail Act of 1980, enacted during a time of increasing car surplus, Congress eliminated the provision for incentive charges. Throughout the period after 1920,

however, the statute has continually provided that the Commission "may" establish regulations concerning car service.

As currently codified at 49 U.S.C. 11122, the statute provides:

> Compensation and practice
>
> (a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include—
>
> (1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;
>
> (2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and
>
> (3) sanctions for nonobservance.
>
> (b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

2. This case concerns a complaint filed by Lo Shippers Action Committee (LOSAC) claiming that allowances paid by railroads for the use of privately owned covered hopper cars are unlawful because they do not allow

owners to recover the "full cost of ownership," including a reasonable return on investment.

Beginning in 1980, allowance rates were set according to a formula contained in an agreement between the railroads and LOSAC. This agreement was not prescribed by the Commission, but was filed as a general allowance tariff. In 1982, the railroads informed LOSAC that, given the growing surplus of covered hopper cars, they would no longer adhere to the compensation formula set forth in the agreement. The railroads accordingly began to set allowance rates individually.

LOSAC filed a complaint with the Commission, claiming that the refusal of the railroads to adhere to the formula set forth in the 1980 agreement was unlawful. LOSAC argued that the agreement formula accurately reflected the costs of car ownership, and that Section 11122 guaranteed owners the full recovery of their costs, regardless of the consequences for other goals enumerated in that provision. LOSAC also challenged reduced allowances filed in tariffs by various carriers in conjunction with reduced freight rates, chiefly on grain. LOSAC sought damages for these alleged past violations of the Act and a uniform nationwide prescription requiring the publication of higher allowances for the future.

The Commission rejected the demand for nationwide relief. As an initial matter, the Commission found that the 1980 agreement was not itself an obligation enforceable against the railroads, because it had not been prescribed by the Commission. Indeed, the Commission observed (Pet. App. B15) that it had "never found it necessary to prescribe a uniform system of compensation to be paid for privately owned covered hopper cars, the cars at issue here."

The Commission then turned to LOSAC's primary contention, that the tariff allowances filed by the railroads

after 1982 were unlawful under Section 11122 because they did not ensure the full recovery of the owners' costs. The Commission rejected this contention, finding (Pet. App. B18) both that the prescription of allowance rates is discretionary, and that if the Commission does prescribe such rates, it must consider a variety of factors under the statute, not just costs. The Commission concluded that its authority to set car compensation rates is discretionary because the statute merely states that the ICC's regulations "may include" the compensation to be paid; the agency noted that it is "not required to prescribe compensation for any type of car" (Pet. App. B15). And the Commission noted that it has consistently recognized[1] that if it does prescribe car hire compensation, it "must consider the sometimes conflicting goals of: (1) a 'fair return' on costs; and (2) the national level of car ownership and other non-cost factors that affect the supply and efficient use of cars" (*ibid.*).

Applying these competing statutory goals to LOSAC's complaint, the Commission stressed the practical consequences of awarding the relief requested by LOSAC, particularly during a time of car surplus. Application of the 1980 formula would result in dramatically higher car rates, increasing allowances from 18 to 24 cents per mile to as high as $1.19 a mile (Pet. App. B11, B20). These higher

---

[1] The Commission cited *Car Service Compensation—Basic Per Diem Charges*, 1 I.C.C.2d 742, 749 (1985); *Exemption from Regulation Boxcar Traffic*, 367 I.C.C. 747, 760 (1983), rev'd on other grounds in *Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), cert. denied, 471 U.S. 1069 (1985); *Suspension of Car Hire Updates* (not printed) (served January 2, 1986); *Mileage Allowances for Covered Hoppers, Grain and Grain Products, BN* (not printed) (served December 5, 1985); *Order Granting Railroads Flexibility in Setting Per Diem Levels*, 364 I.C.C. 107, 109 (1980); and *Zone of Reasonableness for Car Hire Charges*, 364 I.C.C. 299, 306 (1980).

allowances, the Commission found, would result in higher freight rates, especially with regard to grain, a major commodity moving in these cars (*id.* at B10, B21). The Commission further found that grain traffic is subject to strong competition that has already forced transportation rates to reduced levels, so that the railroads would have to pass along these increased car hire costs in the form of higher freight rates (*id.* at B21). Such rate increases, the Commission concluded, would result in a further loss of traffic to the railroads, a decrease in covered hopper car use, and an even greater car surplus (*id.* at B20-B21).

Based on this analysis, the ICC determined (Pet. App. B21) that LOSAC's proposal would not further the "efficient use of freight cars." 49 U.S.C. 11122(a). It also found that the proposal would disregard the "transportation use" of each type of freight car (Pet. App. B21), and would contravene Section 11122's instruction that the rate should only be high enough to "encourage the purchase, acquisition, and efficient use of freight cars"—not high enough to encourage a continuing expansion of an already surplus fleet (Pet. App. B19). The Commission concluded (*id.* at B21):

> Taking all the factors of §11122 into account, the assailed levels of car compensation on private covered hopper cars have not been shown to be unlawful. Under prevailing market conditions, reductions below full cost-of-ownership allowance levels have been justified by considerations of excessive fleet size and the need to maximize car use. In fact, the record in this case shows that allowing market based car hire returns, instead of prescribing fixed returns, best accommodates the various factors we are required by the statute to consider.

Although it denied LOSAC's request for nationwide relief, the Commission stressed that this did not preclude

car owners from challenging individual allowances set by railroads.

3. The court of appeals affirmed. The court agreed with the Commission that the language of Section 11122 does not require the agency to prescribe nationwide rates for car compensation (Pet. App. A10-A12). The court also rejected LOSAC's argument that market based allowances below cost (as defined by Section 11122(b)) are unlawful (Pet. App. A12). The court noted that the statute does not indicate whether cost factors or market factors are to be given greater weight in any particular case, and thus found that the agency has considerable discretion to determine how to weigh the various factors (*ibid.*). In light of the statutory language, previous Commission action, and legislative history, the court concluded that the Commission's interpretation of the statute was "more than reasonable" (*ibid.*). Finally, the court held that the ICC, having correctly determined that LOSAC's argument was based wholly on the incorrect premise that Section 11122(b) requires full cost recovery, was not required to consider whether to prescribe allowances above existing rates but below the level demanded by LOSAC (Pet. App. A14).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is therefore not warranted.

1. Petitioner's principal argument (Pet. 11-12) relates to the legislative history of the 1966 version of the car hire statute. LOSAC contends that in 1966 Congress set a cost recovery floor for car hire compensation that is still controlling. LOSAC further asserts (Pet. 12-13) that the Com-

mission and the court of appeals disregarded the clear import of the 1966 legislation only by focussing on language introduced by the recodification of the Interstate Commerce Act in 1978. Since the 1978 recodification was not intended to make any substantive changes in the Act, LOSAC concludes that the Commission's interpretation of the Act frustrates the purposes that animated Congress in 1966.

The premises of petitioner's statutory construction argument are doubly flawed. First, the discretionary language relied upon by the Commission and the court of appeals—that car service regulations "may include" rate prescriptions—derives from an amendment to the original Esch Car Service Act of 1917 adopted by Congress in the Transportation Act of 1920. The original Act had provided (Pet. App. D1 to D2 (emphasis added)) that "[t]he Commission *shall*, after [a] hearing * * * establish reasonable rules, regulations, and practices with respect to car service, including * * * compensation to be paid for the use of any car not owned by any such common carrier * * *." The 1920 Act amended this to read (Pet. App. D2): "The Commission *may*, after hearing, * * * establish reasonable rules, regulations, and practices with respect to car service by *carriers by railroad subject to this Act*, including the compensation to be paid for the use of any *locomotive*, car, *or other vehicle* not owned by *the carrier using it* * * *." The critical introduction of the discretionary word "may" thus long predates the recodification of 1978.[2]

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[2] It is true that the recodification rendered the discretionary language as "may include" rather than "may * * * establish," but petitioner has not advanced any reason why this stylistic modification was significant, or why it may have influenced impermissibly the Commission's interpretation.

Second, the 1966 amendment did not purport to take away the Commission's discretion in determining whether to establish regulations. The dispositive language, stating that the Commission "may * * * establish reasonable rules, regulations, and practices" was not changed by the 1966 amendments. See Pet. App. D3. Instead, Congress added a provision directing the Commission to take certain factors into account—including the possibility of requiring incentive payments to stimulate the supply of cars—when it determined to exercise its discretion by establishing such regulations. As the court of appeals recognized (Pet. App. A10), the introduction of the use of the mandatory word "shall" related only to "what factors should be, indeed, must be, employed in determining what those rates will be if and when regulated."[3]

In any event, even if petitioner were correct in its characterization of the intention of Congress in 1966, those intentions were largely if not totally negated by important changes made in Section 11122 in 1976[4] and 1980.

---

[3] Thus, if the Commission elects to prescribe per diem rates or allowances, subsection (b) of Section 11122 lists a number of factors which the Commission must consider in setting such rates, including (1) "the expense of owning and maintaining that type of freight car;" (2) a "fair return on its cost;" (3) "the transportation use of each type of freight car;" (4) "the national level of ownership of each type of freight car;" and (5) "other factors that affect the adequacy of the national freight car supply." The Commission, however, is not required to issue regulations prescribing rates of compensation for car service when requested to do so; subsection (a) of Section 11122 makes clear that the Commission's regulations "may include" prescribed rates of compensation, but does not say that the regulations must include this element.

[4] In the 1966 amendment, the ICC was instructed to "determine whether compensation should be computed solely on the basis of elements of ownership expense * * * or whether such compensation should be increased by such incentive element * * *." See Pet. App.

Specifically, in the Staggers Rail Act of 1980, Congress eliminated the incentive per diem provision introduced in 1966, and the legislative history accompanying that change unequivocally supports the Commission's interpretation of the statute.

Shortly before the enactment of the Staggers Act, the Commission had announced that flexibility was necessary in setting per diem rates in order to improve car use during what the Commission characterized as a period of rapidly worsening car surplus. *Order Granting Railroads Flexibility in Setting Per Diem Levels,* 364 I.C.C. 107 (1980). The Conference Report on the Staggers Act indicates that Congress was aware of the Commission's position, and approved of it. The Report instructed the agency to "continue to examine means (such as flexible car hire) of making basic car hire more responsive to market forces * * *." (H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 117 (1980)). Congress even used the same term that the ICC had used to describe its program of allowing car hire rates to fall below full cost during times of car surplus: "flexible car hire." In light of this clear ratification of the agency's policy, the court of appeals correctly upheld the Commission's interpretation to allow lower allowances in times of car surplus.[5]

D3. In the Rail Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 212, 90 Stat. 46, Congress deleted the instruction to the ICC to consider setting basic compensation *solely* based on ownership expenses, ~~Congress~~ AND reorganized the statute to require the ICC to consider several noncost factors in the formula, including transportation use, national level of ownership, and adequacy of supply. See Pet. App. D4 to D5.

[5] It follows that higher allowances during periods of car shortage would also be appropriate. As the Commission explained in *Zone of Reasonableness for Car Hire Charges,* 364 I.C.C. 299, 305 (1980), while in the short term compensation rates may fluctuate at times

2. LOSAC contends (Pet. 22-25) that the decision of the court of appeals is in conflict with the Court's decision in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940), which it believes stands for the proposition that the Commission must prescribe allowances whenever it is requested to do so.[6] However, in *El Dorado Terminal*, the Court was concerned with a different provision of the Act, former Section 15(13) (now 49 U.S.C. 10747) which gives the ICC authority to determine whether allowances to shippers are too high (amounting in effect to a rebate). The Court merely said that allowances must be published openly in a tariff, and that the issue of whether such rates are too high is for the Commission to determine in the first instance. 308 U.S. at 432. *El Dorado Terminal* thus does not require that the Commission prescribe a floor for allowances upon complaint especially when, as here, the party requesting that action has not met its burden of proving that a prescription is necessary under the Act.

3. Finally, LOSAC contends (Pet. 25-26) that the court of appeals erred in permitting the Commission to deregulate allowances without making the required findings under the provision for exempting carriers from provisions of the Act, 49 U.S.C. 10505. The short answer to this contention is that the Commission has not deregulated

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below full cost, in the long run (the life of the car), ownership costs will be returned to encourage purchase of an appropriate car supply.

[6] The court of appeals decision here is in harmony with the only court of appeals decisions dealing with Section 11122. The court's basic conclusion that in regulating car hire, the Commission properly took heed of all of the factors enumerated in that provision, is in accord with the decisions in *Consolidated Rail Corp.* v. *United States*, 619 F.2d 988 (3d Cir. 1980), and *Brae Corp.* v. *United States*, 740 F.2d 1023 (D.C. Cir. 1984), cert. denied, 471 U.S. 1069 (1985).

car hire allowances. The Commission did not refuse to adjudicate LOSAC's complaint. Rather, it simply found that LOSAC had failed to meet its burden of proof. The Commission also determined that it would not further the goals of Section 11122 to promulgate new regulations imposing an unprecedented nationwide prescription of car hire rates for covered hopper cars. That is not deregulation either, because the Commission merely maintained the status quo. Finally, as the Commission explained (Pet. App. B30 (footnote omitted)):

> Although we are declining to prescribe a uniform system of car allowances, shippers and car owners who believe that a carrier or carriers have forced them to supply cars for unreasonably low compensation can seek prescription to remedy a specific problem.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPPLEMENTAL BRIEF FOR PETITIONER UNDER RULE 22.6

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The purpose of this supplemental brief is to invite the attention of the Court to the decision of the United States Court of Appeals for the District of Columbia Circuit in its No. 87-1125, *General American Transportation Corporation, et al. v. Interstate Commerce Commission, et al.*, and related case, opinion filed April 14, 1989, a copy of which is appended hereto as Appendix I.

That decision, referred to hereafter as *GATX*, is a specific application of the erroneous construction of 49 U.S.C. § 11122(b) by the same Court that decided this case, sometimes referred to herein as *LOSAC*, (App. I, pp. 16–21). GATX demonstrates the importance to the whole transportation industry, and particularly to shippers who provide private cars used by the railroads in lieu of their own cars to fulfill their common-carrier obligation, of the issues raised in the present case relating to the construction of § 11122(b). Further, it shows how the disastrous effects of a misconstruction of § 11122(b) can and will rapidly spread, since *GATX* creates a whole new category of expense of maintaining private

cars, which § 11122(b) says shall be recovered by shippers as compensation for providing the car, but which the ICC and the Court of Appeals now say the shippers have no right to recover. In view of the Court of Appeals' superficial and desultory treatment of those issues in the decision here under review, it is important that this Court review those issues and authoritatively determine the proper construction of § 11122(b).

In *GATX*, the Court of Appeals approved (App. I, p. 4) the ICC's "reinterpretation" of the Interstate Commerce Act, 49 U.S.C. § 10101, et seq. and the ICC's reversal of what the Court referred to (Id., p. 3) as its "40-year old policy" of not permitting rail carriers to assess charges on empty movements of private cars to repair facilities. What the Court described as a "policy", however, was based upon the ICC's holding in *General American Transp. Corp. v. Indiana Harbor Belt R. R. Co.*, 357 I.C.C. 102 (1977) (referred to in *GATX* as *Indiana Harbor I*), where as the Court described it (App. I, p. 5), the ICC "reaffirmed its then longstanding prohibition on empty-repair-move-charges" on the ground that private cars used by the railroads to discharge their common carrier obligation were "instrumentalities of transportation" and therefore not subject to tariff charges applicable on shipments of property. Contrary to what the ICC and the Court in *GATX* imply, that decision was not simply a "policy" decision, but rather turned on the *legal status* of cars moving to repair facilities. The Seventh Circuit affirmed that decision in *Indiana Harbor Belt R. R. Co. v. General American Transp. Corp.*, 577 F.2d 394 (7th Cir. 1978).

In *General Am. Transp. Corp. v. Indiana Harbor Belt R. R. Co.*, 3 I.C.C.2d 599 (1987), referred to in *GATX* as *Indiana Harbor II*, the ICC "reinterpreted" the Interstate Commerce Act, as the Court put it, so as to permit it to hold that the railroads could impose charges on movements of empty private cars to repair facilities as if such cars were commercial freight. This was based primarily on the ground that this was a mere "accounting change", that the responsibility for such moves still remained with the railroads, but under § 11122(b) the shippers should and would recover such expenses through the allowance system.

The ICC "decided" *Indiana Harbor II* on February 17, 1987, but did not serve the decision until March 22, 1987. In the interim, the ICC on February 24, 1987, in an open voting conference, decided *LO Shippers Action Committee v. Aberdeen & Rockfish Railroad Co.*, the decision here under review, in which the ICC held that allowances need not be determined by the cost of owning and maintaining the type of car involved. Apparently realizing that its decision in *LOSAC* invalidated the reasoning on which *Indiana Harbor II* was based, the ICC, on reconsideration of that decision in a report served February 29, 1988, not printed, referred to in *GATX* (App. I, p. 18), changed its rationale, holding, citing *LOSAC*, that although "[the] railroads' obligation to compensate car owners for cost of ownership still exists", shippers are not entitled to recover their costs of ownership. The Court described the ICC's reasoning as "a bit facile" [Id., p. 17] but nevertheless approved it, but then went on to say (Id., p. 19) that "section 11122 of the Act, . . . plainly contemplates initial railroad charges for freight movements with a 'pass-back' of ownership costs to carriers through allowances." The Court apparently saw no inconsistency between its characterization of § 11122(b) and the result it reached.

The Court seemed to think it avoided this inconsistency by saying (Id., p. 17) that *LOSAC* held that "railroads have no obligation under the Interstate Commerce Act to reimburse car providers, through allowances, for their *complete* costs of ownership." (Court's italics) Such a description of the *LOSAC* decision is pure sophistry. The effect of the decisions of both the ICC and the Court of Appeals in *LOSAC* is that allowances for private cars need not be "determined" by *any* costs of ownership.

The statute (49 U.S.C. § 11122(b)) says that "[the] rate of compensation to be paid for each type of freight car *shall be determined by* the expense of owning and maintaining that type of freight car." (Emphasis added) To say that this means that allowances can be determined by the market place and still comply with § 11122(b) because they cover some portion of the expenses of ownership is to read into the statute

something that is not there and to read out of the statute something that is there.[1]

The Court of Appeals' decision in *GATX* is a very substantial extension of its misconstruction of § 11122(b) in *LOSAC*. When LOSAC represented to the Court in its petition (p. 8) that the effect of the *LOSAC* decision would be to undercompensate each year "to the extent of hundreds of millions of dollars" shippers who have invested in equipment, that referred only to what was considered at the time of the hearing in *LOSAC* to be the then recognized expenses of owning and maintaining cars. It did not contemplate that the ICC would impose an additional burden of millions of dollars per year on shippers by "reinterpreting" the Act to transfer to shippers the cost of switching to repair facilities cars used as instrumentalities of transportation, an expense previously (for at least 40 years) considered to be the responsibility of the railroad industry. To interpret § 11122(b) to permit such a result simply permits the railroads, with the approval of the ICC, to flaunt the requirements of § 11122(b) in any manner they choose. Had § 11122(b) been correctly construed in *LOSAC*, no such result could have been reached in *GATX*.

The Court in *GATX* apparently thought it avoided that problem by saying (Id., p. 20) that the ICC was not obliged

[1] It is important for this Court to understand that allowances determined by costs of ownership and what the ICC refers to euphemistically as market-based allowances (which in this case are allowances which the railroads are able unilaterally to impose on unwilling shippers in a market controlled by the railroads) are mutually inconsistent concepts. Of course any allowance, even one cent per mile, may be said to cover "some" expenses of ownership. The question here is whether "shall be determined by the expense of owning and maintaining that type of freight car" means something other than what it plainly says. Congress did not say that allowances shall be determined by something less than the expense of owning and maintaining the cars, as both the ICC and the Court would imply by use of the word "complete." And Congress clearly had no obligation to say that by "the expense of owning and maintaining" the car it meant the "complete expense" of so doing. That would have been redundant.

in the *GATX* proceeding "to engage in full-scale scrutiny of [the] recovery systems."[2] But the ICC and the Court *are* obliged to engage in such full-scale scrutiny when the lawfulness of such a system is directly challenged, as it was in *LOSAC*.

As the decisions in both *GATX* and *LOSAC* demonstrate, the problem of what compensation is to be paid by railroads for the use of private cars is a complex one with many ramifications and its resolution will have a vital effect on all shippers who provide private cars, as well as on the railroads which use them. To do justice to all the conflicting interests requires full scrutiny of those issues and a determination at the highest level of how § 11122(b) is to be construed. Certainly it requires that this Court look at the words actually enacted by Congress and at their legislative history.

Respectfully submitted,

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DATED: May 8, 1989

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[2] As in *LOSAC*, the Court in *GATX* misstated LOSAC's argument there. LOSAC did not argue, as the Court implies (p. 20), that the ICC was obliged in that case "to engage in full-scale scrutiny of those recovery systems." What LOSAC argued was that it was arbitrary and irrational for the ICC to attempt to justify charges to repair facilities on the ground that they would be recovered by shippers under the allowance system when the ICC knew full well that in *LOSAC* it had held that shippers had no right to recover these expenses.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 9, 1989 Decided April 14, 1989

No. 87-1125

GENERAL AMERICAN TRANSPORTATION CORPORATION, et al., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

LO SHIPPERS ACTION COMMITTEE, BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO., U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC., ASSOCIATION OF AMERICAN RAILROADS, CHEMICAL MANUFACTURERS ASSOCIATION, INTERVENORS

No. 87-1171

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

ASSOCIATION OF AMERICAN RAILROADS, BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO., et al.,

CHEMICAL MANUFACTURERS ASSOCIATION, MBF INDUSTRIES, INC., INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 88-1284

RAILWAY PROGRESS INSTITUTE COMMITTEE ON TANK CARS, et al., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

ASSOCIATION OF AMERICAN RAILROADS, BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD CO., et al., INTERVENORS

Petitions for Review of Orders of the Interstate Commerce Commission

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Patrick M. Raher, with whom *Elizabeth B. Heffernan*, *Thomas F. McFarland, Jr.*, *David F. Zoll*, *John L. Oberdorfer*, *Scott N. Stone*, *Peter A. Greene*, *R. Hale Foote* and *Henry M. Wick, Jr.*, were on the joint brief, for petitioners and intervenors Chemical Manufacturers Association, MBF Industries, Inc., and U.S. Clay Producers Traffic Association, Inc. in 87-1125, 87-1171 and 88-1284.

Peter F. Rousselot also entered an appearance for petitioners in 87-1171.

Dennis J. Starks, Attorney, Interstate Commerce Commission, with whom *Henri F. Rush*, Deputy General Counsel, *Robert S. Burk*, General Counsel, *John J. Powers, III* and *John P. Fonte*, Attorneys, Department of Justice, were on the brief, for respondents in 87-1125, 87-1171 and 88-1284.

Stephen C. Herman, with whom *Harold E. Spencer* was on the brief, for intervenor LO Shippers Action Committee in 87-1125, 87-1171 and 88-1284.

Robert M. Jenkins, III, with whom *Paul A. Cunningham, Marc D. Machlin, W. Susanne Addy, Joseph D. Anthofer, James L. Howe, III, John B. Norton, William R. Power, Charles C. Rettberg, Alice C. Saylor, James C. Schultz, John MacDonald Smith, J. Thomas Tidd* and *Dennis W. Wilson*, were on the brief, for intervenor Association of American Railroads in 87-1125, 87-1171 and 88-1284.

Anna M. Kelly, Emried D. Cole, Jr., and *Paul R. Hitchcock* filed a joint brief for intervenors The Indiana Harbor Belt Railroad Co. and the Baltimore and Ohio Chicago Terminal Railroad Co. in 87-1125, 87-1171 and 88-1284.

Lawrence M. Cohen and *Shayle P. Fox* filed a brief for *amicus curiae* Rescar, Inc. urging that the petitions be granted.

William Henry Barrett also entered an appearance for *amicus curiae* Rescar, Inc.

Before: SILBERMAN, WILLIAMS and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: In these consolidated cases, petitioners [1] request review of the Interstate Commerce Commission's reversal of a forty-year old policy that substantially prevented railroads from charging the owners

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[1] We use the term "petitioners" to refer collectively to petitioners General American Transportation Corporation, General Electric Railcar Services Corporation, Union Tank Car Company, and intervenors in support of petitioners Chemical Manufacturers Association, MBF Industries, Inc., U.S. Clay Producers Traffic Association, and LO Shippers Action Committee ("LOSAC").

of private railcars for the costs of transporting their cars (when empty) to repair depots for ordinary maintenance. We hold that the Commission's reinterpretation of the statute is permissible and rationally explained, and further conclude that it was within the Commission's discretion to apply its new policy retroactively to the parties before it in this adjudication. Accordingly, we deny the petitions in all respects.

I.

Railroads, pursuant to their common-carrier obligations under the Interstate Commerce Act, must provide railcars suitable for the transportation of a broad range of property, including agricultural products, flammable liquids, as well as crated freight. In part because of these diverse requirements, it has proved impracticable for rail common-carriers to invest the capital necessary for the acquisition of general-use and specialty rolling stock. Carriers, therefore, commonly lease railcars both from firms in the business of supplying railcars and, occasionally, from shippers themselves. Under these leasing arrangements, railroads fulfill their common-carrier obligation to make available suitable railcars by paying car providers their costs of owning the rolling stock through a variety of means, including direct "mileage allowances" and offsets on line-haul freight tariffs.

Railcars "provided" to railroads in this manner accrue a substantial amount of "empty mileage"—mileage traveled without carrying any freight—in part because railcars commonly make a so-called "empty return." Railroads are not permitted to charge the railcar owners or car providers separately to return an empty car to the point of origination; instead, carriers may recover the cost of an empty return only by incorporating it in their rates for the line-haul movement of freight. In addition, railcars are periodically moved empty to repair depots selected by car providers. Up until the challenged

order was filed, the Commission treated such empty-repair mileage identically to empty-return mileage by prohibiting carriers (in most circumstances) from charging car providers separately for empty-repair moves. In a 1977 adjudication involving many of the parties before us today, *see General Am. Transp. Corp. v. Indiana Harbor Belt R.R. Co.*, 357 I.C.C. 102 (1977) ("*Indiana Harbor I*"), *aff'd sub nom. Indiana Harbor Belt R.R. Co. v. General Am. Transp. Corp.*, 577 F.2d 394 (7th Cir. 1978), the Commission reaffirmed its then longstanding prohibition on empty-repair-move charges. It held that private railcars moving empty for repair continued to serve as "instrumentalities of transportation" during such movements since repairs enabled railroads to maintain their use of such cars for revenue-generating purposes. Accordingly, the Commission concluded that empty-repair moves were *not* "distinct rail services" for which railroads could impose a separate tariff; rather, such moves were deemed a collective responsibility of those carriers who derive more than *de minimus* economic benefit (through line-haul freight charges) from the use of privately-owned railcars. 357 I.C.C. at 126-27.

Whatever its merits, *Indiana Harbor I*'s regime of collective railroad responsibility for empty-repair moves left certain carriers (predominantly switching or terminating railroads)[2] with an empty-repair mileage burden considerably out of proportion to the economic benefit those carriers derived from the line-haul movement of freight. And cross-subsidization among railroads was not the only perceived evil of *Indiana Harbor I*: the rule was believed to encourage inefficient depot selections because the costs of empty-repair transportation were imposed on parties other than those selecting the repair depot locations. In

[2] "Switching railroads" include short lines that transfer cars between line-haul networks, while "terminating railroads" provide service at either end of a commonly-traversed network.

1983, the Indiana Harbor Belt Railroad ("IHB") and the Baltimore & Ohio Chicago Terminal Railroad Company ("BOCT"), two carriers that found themselves disadvantaged by *Indiana Harbor I*, filed proposed tariffs for empty-repair moves in an effort to prompt the Commission to change course. The IHB and the BOCT contended that the statutory basis for the theory of collective responsibility had been undermined by recent congressional enactments designed to give railroads greater flexibility in imposing tariffs for rail services. The proposed tariffs elicited virtually immediate complaints from car providers,[3] and the instant proceeding began.

After an initial dismissal of the complaints by an administrative law judge and a subsequent reversal by the ICC Review Board (holding that *Indiana Harbor I* controlled the case), the complaints were appealed to the full Commission in July 1984. The ICC stayed the Review Board's order and published a notice in the Federal Register indicating that it was considering modifying or reversing *Indiana Harbor I*. *See* 49 Fed. Reg. 39,740 (1984); *see also* 50 Fed. Reg. 10,867 (1985) (soliciting additional comments). The Commission thereafter reopened the record underlying the complaints before it (and in *Indiana Harbor I*) and invited industry comments concerning, among other issues, whether or not the prohibition against empty-repair-move charges was efficient and equitable.

Three years later, after compiling an extensive record, the Commission reversed *Indiana Harbor I* and ruled that carriers may impose tariffs on car providers for empty-repair moves. *See General Am. Transp. Corp. v. Indiana Harbor Belt R.R. Co.*, 3 I.C.C.2d 599 (1987) ("*Indiana Harbor II*"). The Commission revisited the

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[3] The complainant car providers unsuccessfully sought interim ICC suspension of the proposed tariffs. *See* 49 U.S.C. § 10707 (1982) (providing suspension authority).

statutory questions analyzed in *Indiana Harbor I* and concluded that the Interstate Commerce Act, at least after its amendment by the Railroad Revitalization and Regulatory Reform Act ("the 4R Act")[4] and the Staggers Act[5] does not prohibit carriers from imposing an initial charge on car providers for empty-repair moves. *See Indiana Harbor II* at 606-11. The ICC further explained that permitting carriers to impose initial repair-move-charges would redress the problem of intercarrier misallocation of empty-repair-mileage burdens and improve efficiency in the selection of repair depots by placing empty-repair-transportation costs, in the first instance, on car providers. *See id.* at 613-16. The ultimate responsibility for the costs of owning railcars, including the costs of empty-repair moves, would continue to be transferred to railroads through customary channels—such as mileage allowances. *See id.* at 614. Since the ICC concluded that *Indiana Harbor I*'s prohibition on empty-repair-move charges no longer was viable under the Act, it upheld the empty-repair tariffs in the adjudication before it. *See id.* at 620.

The Commission subsequently denied petitioners' request for reconsideration of its *Indiana Harbor II* ruling, setting the stage for this proceeding. Before us, petitioners argue that *Indiana Harbor I*'s prohibition of empty-repair charges is specifically required under the Interstate Commerce Act; that *Indiana Harbor II* rests on an unreasonable construction of the Act and is not supported by a consideration of the legally relevant policy considerations; and that it was unlawful for the Commission to apply *Indiana Harbor II* retroactively to the specific empty-repair tariffs challenged in the underlying adjudication.

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[4] Pub. L. 94-210, 90 Stat. 31 (1976).

[5] Pub. L. 96-448, 94 Stat. 1895 (1980).

II.

We are initially faced with the argument that the Commission's decision fails the first prong of the *Chevron* test that governs federal judicial review of agency statutory interpretation. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Commission's decision, we are told, runs counter to a specific legislative intent barring carriers from charging for the empty movement of privately-owned railcars for repair. We think this contention is insubstantial: neither the statutory language nor its legislative history clearly addresses the point at issue.

Petiitoners contend that the Act specifically prohibits carriers from assessing charges for the movement of instrumentalities of transportation not carrying property, and that Congress intended railcars moving empty for repair to be treated as instrumentalities. Petitioners cite 49 U.S.C. §§ 10761(a)[6] and 10102(26)[7] to support

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[6] Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter.
49 U.S.C. § 10761(a) (1982).

[7] In this subtitle—

* * *

(26) "transportation" includes—

(A) a locomotive, car, vehicle, motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(26) (1982).

their argument, but we find their appeal to those sections of the Act misdirected. Taken together or apart, these passages do not address the issue we confront. Section 10761(a), as petitioners recognize, merely imposes a tariff publication requirement on carriers offering transportation or services within the jurisdiction of the Commission, and in no way purports to restrict categorically the types of services for which tariffs may be imposed. And section 10102(26)'s sweeping definition of transportation plainly hurts, rather than helps, petitioners' strained construction.

Petitioners also rely on 49 U.S.C. § 10728, the provision that permits carriers to "establish separate rates for distinct rail services to [] encourage competition[,] promote increased reinvestment by rail carriers [, and] encourage . . . increased non-railroad investment in the production of rail services." 49 U.S.C. § 10728(a) (1982). The best that can be said for this provision, however, is that it begs the question of whether or not an empty-repair move constitutes one such distinct service. To be sure, prior to the Commission's reversal in *Indiana Harbor II*, the Seventh Circuit twice approved the Commission's former position that empty-repair moves were not distinct rail services, *see Indiana Harbor Belt R.R. Co. v. General Am. Transp. Corp.*, 577 F.2d 394 (7th Cir. 1978) (affirming *Indiana Harbor I* on direct review); *see also Evans Prods. Co. v. ICC*, 729 F.2d 1107 (7th Cir. 1984) (sustaining Commission's application of *Indiana Harbor I* to parties before the court), but neither decision rested on a construction of the Interstate Commerce Act, much less a finding of specific congressional intent. Rather, as we read the opinions, the court simply held that the *Indiana Harbor I* policy was not arbitrary and capricious. These prior judicial affirmations of *Indiana Harbor I* do not preclude the Commission from changing course now.

If specific intent is not found in the original legislation, petitioners argue, it was manifested when Congress legislatively ratified *Indiana Harbor I*. We find that contention equally unconvincing. Congress revisited the Interstate Commerce Act on two occasions subsequent to *Indiana Harbor I*—in 1978 when it recodified the Act [8] and in 1980 when it approved the Staggers Act.[9] But we see no indication that Congress was either aware of or had approved the Commission's empty-repair-move policy when it recodified the "distinct rail services" provision in 1978 or in 1980 when it amended other portions of the Act. We have held that application of the legislative reenactment doctrine requires a showing of both congressional awareness and "express congressional approval of an administrative interpretation if it is to be viewed as statutorily mandated." *AFL-CIO v. Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987); *see also UAW v. Brock*, 816 F.2d 761, 767 (D.C. Cir. 1987); *Association of American Railroads v. ICC*, 564 F.2d 486, 493 (D.C. Cir. 1977). Petitioners' argument thus is unavailing.[10]

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[8] Pub. L. 95-473, 92 Stat. 1337 (1978).

[9] Pub. L. 96-448, 94 Stat. 1895 (1980).

[10] The Supreme Court has said, even absent proof of congressional awareness or approval, that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). However, whatever its weight, we believe such "evidence" is more relevant to *Chevron*'s second prong. In any event, we think the force of congressional silence is particularly weak in this case given the abundant evidence (which we discuss in Part III) that Congress, in passing the Staggers Act, wanted to put an end to ratemaking practices involving railroad cross-subsidization and other inefficiencies.

III.

We turn to what we see as the heart of petitioners' case —that the Commission's empty-repair-move policy announced in *Indiana Harbor II* rests on an unreasonable construction of the Interstate Commerce Act. In this section, we also address petitioners' challenge to the logic and rationality of the *Indiana Harbor II* decision, for we think the questions posed—has the Commission adopted an impermissible construction of the Act and is its empty-repair-move policy arbitrary and capricious—are quite similar.[11] Both questions require us to determine whether the Commission, in effecting a reconciliation of competing statutory aims, has rationally considered the factors deemed relevant by the Act. *See AFL-CIO v. Brock*, 835 F.2d at 917; *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987); *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 152 (D.C. Cir. 1984); *cf. NLRB v. United Food & Comm'l Workers Union*, 108 S. Ct. 413, 421 (1987) (stating that courts owe deference to agency interpretation "as long as [] interpretation is rational and consistent with statute").

While *Chevron* commands deference to the Commission's interpretation of the Act which it administers, we must "look to many factors, among them being the 'thoroughness, validity and consistency of . . . [the] agency's reasoning.' " in determining the precise weight to be assigned the Commission's construction in the case before us. *Orloski v. Federal Election Comm'n*, 795 F.2d 156, 164 (D.C. Cir. 1986) (quoting *Democratic Senatorial Campaign Comm. v. Federal Election Comm'n*, 454 U.S. 27, 37 (1981)). Here, of course, we are not asked to

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[11] We do not understand petitioners independently to have challenged the Commission's application of *Indiana Harbor II* to the facts of this case, except insofar as the Commission's retroactive application of the rule works injustice to the parties to the adjudication, a question we address in Part IV.

review an agency policy at the point of its initial adoption; the order under review represents a reversal of an agency interpretation in force more or less consistently since 1947. *See Union Tank Car Co.*, 268 I.C.C. 338 (1947). But that factor does not mean judicial deference is any less appropriate; indeed, *Chevron* itself involved an agency about-face on a significant question of statutory construction. *See Chevron*, 467 U.S. at 857-58. Under these circumstances, however, the Commission bears the burden of rationally explaining its departure from its previous interpretation. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983); *see also Natural Resources Defense Council v. EPA*, 725 F.2d 761, 767 (D.C. Cir. 1984). We think the Commission has discharged this responsibility in *Indiana Harbor II*.

A.

The Commission thought it appropriate to reexamine its empty-repair-move policy for two principal reasons. First, it believed the *Indiana Harbor I* rule, under which railroads that participate in some measure in the line-haul carriage of freight were forced to bear collective responsibility for the costs of empty-repair moves, resulted in an inequitable allocation of such costs among the participating carriers, *see Indiana Harbor II*, 3 I.C.C.2d at 604, and in the inefficient placement of empty-repair transportation costs on parties who did not select the repair depot. *See id.* at 611, 616. Integral to its conclusion about unfair intercarrier allocation was the Commission's disenchantment with its so-called "equalization rule" [12] as a means to mitigate cross-subsidization among

[12] The equalization rule in effect at the time of the decision in *Indiana Harbor II* required car providers whose cars accumulated empty mileage in excess of 106% of loaded revenue mileage to pay a tariff on such excess mileage to a common pool administered by a carrier association. The association, in turn, distributed accumulated revenues to individual carriers in accordance with each carrier's excess empty mile-

railroads. *See id.* at 605-06. Second, the Commission observed that the legislative environment in which the empty-repair-move rule was announced in *Union Tank* and affirmed in *Indiana Harbor I*—had shifted from acceptance of notions of collective railroad responsibility and cross-subsidization among carriers to congressional disapproval of those same ideas. *See id.* at 607, 610-11. By the time it decided *Indiana Harbor II*, the Commission believed it was acting against a background of congressional desire for greater efficiency in the management of the nation's rail transportation system through increased reliance on market forces.

The record, it seems to us, adequately buttresses these conclusions. Evidence showed that the prior rule, which prohibited empty-repair charges if the carrier derived greater than *de minimus* revenues from the line-haul movement of freight, placed unfair burdens on certain carriers. And despite the expectations it expressed in *Indiana Harbor I*, *see Indiana Harbor I*, 357 I.C.C. at 125, the Commission was presented with abundant indications that the equalization rule was fundamentally ineffective in leveling the differential burdens imposed by its empty-repair charge scheme. Because the rule was designed primarily to address *provider* responsibility for excess non-revenue mileage, and as "there [was] no necessary relationship between each *carrier's* share of repair move responsibility in terms of loaded revenue miles and its participation in repair move operations," use of the

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age burden. The 106% figure was designed to account for both empty-return mileage (100% of revenue mileage) and reasonable empty-repair mileage (an additional 6% of revenue mileage).

We note that petitioners' theory —under which all costs of empty-repair moves are presumptively the collective responsibility of carriers—is somewhat inconsistent even with the equalization rule, under which at least a portion of these costs may be borne by car providers if their cars accrue excess non-revenue mileage.

equalization accounts could not be expected to prevent railroad cross-subsidization. *Id.* at 606 (emphasis added). The Commission cited the experience of one of the *Indiana Harbor II* carrier-parties to illustrate its point: between 1978 and 1982 the IHB had performed empty-repair switching services which, if charges had been allowed, would have earned the carrier $856,452. Yet the IHB recovered only $96,263 under the equalization rule for the services in question. *See* 3 I.C.C.2d at 604. Permitting carriers to charge for empty-repair moves, the Commission thought, would resolve the intercarrier-allocation problem without doing violence to the principle of carrier responsibility for the costs of owning railroad cars, for car providers could simply combine the costs of empty-repair moves with other costs of ownership in charging the railroads mileage allowances.[13] *Indiana Harbor II* was described by the Commission as, in large measure, a change in the "methods of accounting for the repair cost element of private car owners' expenses." 3 I.C.C.2d at 10.

Recent rail transportation legislation supports the Commission's judgment that Congress intended the Interstate Commerce Act to be administered with an eye toward eliminating inefficient ratemaking practices. The Commission cited various provisions in the 4R and Stag-

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[13] The Commission concluded as well that allowing carriers initially to impose charges for empty-repair moves would place the costs of such moves on the parties selecting the repair depots—the car providers—and thus promote more efficient depot selections by forcing providers to consider transportation as well as repair costs. *See* 3 I.C.C.2d at 611. Petitioners insist that the 106% equalization rule already encourages car providers to designate the "closest suitable repair shop" by penalizing providers if their cars accrue excess non-revenue miles. The Commission reasonably believed, however, that *Indiana Harbor II* would bring about efficiency gains in repair depot selections vis-a-vis the prior regime by enabling car providers to account more precisely for the transportation costs associated with the choice of a particular repair shop.

gers Acts, not as reflective of Congress' specific intent on the question, but rather as indicative of the tension between *Indiana Harbor I*'s collective-responsibility rationale and general congressional purposes. We think the Commission permissibly discerned an emerging congressional purpose to permit carriers to price their services efficiently in accordance with both the costs properly chargeable to such services and market forces in order to "provide *all* carriers with a realistic opportunity to earn adequate revenues." 3 I.C.C.2d at 611 (emphasis added). The Commission relied on language in section 101(a) of the Staggers Act stating that "it is the policy of the United States Government [] to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail," 49 U.S.C. § 10101a(1) (1982), to "promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues," *id.* § 10101a(3), and "to encourage . . . efficient management of railroads and . . . the elimination of noncompensatory rates." *Id.* § 10101a(10). The Commission found further support for this notion in statutory provisions that appear to disapprove of rates that "do not contribute to going concern value" and "encourage[] cross-subsidization." 3 I.C.C.2d at 611; *see* 49 U.S.C. § 10701a(b)(3) ("the Commission shall recognize the policy of this [Act] that rail carriers shall earn adequate revenues"); *id.* § 10701a(c) ("[a]ny rate for transportation . . . that does not contribute to the going concern value of [the] carrier is presumed to be not reasonable"); *id.* § 10704(a)(2) (Commission shall enable carriers to earn adequate revenues); *id.* § 10707a(e)(2) (Commission shall consider the extent to which rates which do not contribute to going concern value can be changed).

Of course, these provisions do not *compel* the approach adopted by the Commission in *Indiana Harbor II*. None

of the provisions is specifically directed to relations between carriers and car providers. Taken together, though, the passages support the reasonableness of the Commission's construction of the Act. Congress' objective of an efficient railroad rate structure, and its attendant goal of ensuring that *individual* carriers have the opportunity to earn adequate revenues, at minimum runs counter to *Indiana Harbor I*'s premise of collective responsibility. We think, then, that the Commission has tendered a facially adequate explanation for reversing its course by demonstrating how the factual and legal predicates that underlay *Indiana Harbor I* were either misconceived originally or have since substantially eroded.

Petitioners and intervenor LOSAC nevertheless attack the internal logic and consistency of the Commission's reasoning. LOSAC argues that the premises of the Commission's "accounting change" and "revenue adequacy" explanations of *Indiana Harbor II* are fundamentally inconsistent; the former implicitly assumes that as between railroads and car providers generally, *Indiana Harbor II* will be revenue-neutral, while the latter—focused on increased revenues for railroads—explicitly assumes otherwise. LOSAC misapprehends the Commission's justification, however. The ICC's concerns over "revenue adequacy," driven in large part by changes in congressional policy (evidenced in the Staggers Act), had little to do with carriers *generally*, as LOSAC assumes; rather, the Commission was concerned with the distributive inequity of saddling *certain* carriers with a disproportionate share of the empty-repair-move burden. 3 I.C.C.2d at 604. Characterized properly, the Commission's "revenue adequacy" and "accounting change" explanations are complementary, not antagonistic.

Still, LOSAC charges that the Commission's "accounting change" justification by itself does not withstand scrutiny. It is argued that *Indiana Harbor II* is a good deal more than a simple change in accounting methods; granting railroads permission to charge "initially" for

empty-repair moves will enable carriers to shift these costs (or at least some of them) to car providers, in violation of the Act's implicit direction that railroads bear the costs of owning railcars used in fulfillment of their common-carrier obligations. *See, e.g.*, 49 U.S.C. § 11121 (a) (1982) (providing that rail carriers "shall furnish safe and adequate car service"); *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915) (same). Car providers, according to LOSAC, are not assured that they will, in turn, be able to pass the costs of empty-repair moves back through to carriers through mileage allowance charges, contract offsets, or otherwise. This is so because in recent years carriers have proved reluctant to update allowances in accordance with increases in costs of ownership, and have imposed arbitrary "caps" on mileage formulas. Under the ICC's recent decision in *LO Shippers Action Comm. v. Aberdeen & Rockfish R.R. Co.*, 4 I.C.C.2d 1 (1987), *aff'd sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988), moreover, railroads have no obligation under the Interstate Commerce Act to reimburse car providers, through allowances, for their *complete* costs of ownership. Instead, the statute permits the Commission, in exercising its discretionary power to regulate car allowances, to look beyond historical costs to car providers to such factors as conditions in the railcar market. *See* 49 U.S.C. § 11122(b) (1982) ("In determining the rate of compensation [to car providers], the Commission shall consider . . . the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply."); *LO Shippers Action Comm.*, 4 I.C.C.2d at 10. LOSAC therefore contends that it was flatly wrong for the Commission to assume that empty-repair-move costs would continue to be borne by carriers.

To be sure, the Commission may have been a bit facile in its initial opinion in suggesting that its decision involved only an accounting change that would have little or no impact in determining who—as between carriers and

car providers—would bear the burden of the costs involved. In its order on rehearing, however, the Commission conceded that car providers may be unable to recoup completely the costs of empty-repair moves from railroads, just as conditions in the railcar market might prevent providers from recovering on a dollar-for-dollar basis their other costs of ownership. And the Commission reiterated, in any event, that the statute simply does not guarantee providers full cost recovery.

We see nothing irrational in the Commission's approach, as clarified on rehearing, toward accounting for empty-repair move costs. It is quite incorrect to assume, as petitioners do, that the Interstate Commerce Act requires the Commission to treat empty-repair-move costs differently than other costs of ownership. As the Commission observed, it would be anomalous to segregate the empty-repair-move component of ownership costs for separate treatment:

> The railroads' obligation to compensate car owners for costs of ownership still exists, but the most plausible statutory basis for discharging that obligation within the regulatory framework of published rates is section 11122, which governs private car compensation generally.

Order on Reconsideration at 2. Private car providers have no statutory right to insulate themselves from market forces generally in fixing allowances to be paid by carriers for the use of railcars. It follows that providers have no right to sequester the empty-repair-move component of ownership costs from market forces either. As the Commission stated in *LO Shippers Action Comm.*, "allowing market based car hire returns, instead of prescribing fixed returns, best accommodates the various factors [the Commission is] required by [section 11122 of the Act] to consider." 4 I.C.C.2d at 14. It seems reasonable, we think, for the Commission to conclude that what is appropriate for ownership costs generally is per-

fectly appropriate for the discrete ownership costs at issue in this case.

The foregoing analysis, in our opinion, fairly disposes of petitioners' related charge that it was irrational for the Commission to attempt to solve a problem of *inter*-carrier cost allocation with the solution of an *extra*-carrier (car provider) charge. The argument assumes, in the first instance, that an extracarrier charge for empty-repair moves is otherwise illegitimate under the Act, an assumption that the Commission has adequately rebutted. The Commission made clear, moreover, that it was the anomaly of treating empty-repair-move costs differently than other costs of ownership (as a collective responsibility of the railroad industry rather than a cost to be borne in direct proportion to a carrier's use of private railcars in the line-haul carriage of freight) that produced the problem of intercarrier cost misallocation. Petitioners' argument, it seems to us, runs aground on section 11122 of the Act, which plainly contemplates initial railroad charges for freight movements with a "pass-back" of ownership costs to carriers through allowances.[14]

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[14] Petitioners' assertion that the railroads' imposition of empty-repair tariffs constitutes "double-charging" for empty moves in violation of sections 10701(a) (prohibiting unreasonable practices) and 11121(a) (prohibiting unreasonable car service practices) of the Act is hyperbole. It is by no means necessarily true that the railroads will be able to "double-charge" for empty-repair moves under *Indiana Harbor II*. Rail tariffs are influenced by a number of factors of which the cost of railcar ownership is only one; depending on conditions in the relatively discrete freight transportation and railcar markets, railroads may over- or underrecover from shippers the costs of railcar ownership passed through to them by car providers. The Commission, in all cases, remains empowered to respond to specific practices in connection with railroad payment of allowances under section 11121(a). In the order under review, in fact, the Commission reserved such issues as the legitimacy of mileage allowance caps and the like for future proceedings on a case-by-case basis. *See Indiana Harbor II*, 3 I.C.C.2d at 615.

B.

Petitioners also contend that the Commission failed to pay heed to numerous legally relevant considerations in fashioning its empty-repair-move policy in *Indiana Harbor II*. It is argued that, prior to reversing *Indiana Harbor I* and allowing carriers to charge for empty-repair moves, the ICC should have undertaken an examination of the techniques by which car providers would be able to recoup empty-repair-move costs from railroads. In other words, because the Commission rested its decision in part on the assumption that car providers could use mileage allowance systems and other measures to recover empty-repair-move costs, the Commission was obliged *in the same proceeding* to engage in full-scale scrutiny of those recovery systems.[15]

We disagree. We are persuaded that the Commission need not have undertaken the elaborate inquiry into mileage allowances requested by petitioners in the *Indiana Harbor II* proceeding. Petitioners do not complain of any *regulatory* obstacle to recovery of empty-repair-move costs from carriers, a concern that might warrant immediate Commission attention. Instead, the car providers cite market forces alone as impeding full recovery. But the Commission has recently decided to allow market forces to influence rates of compensation to car providers, *see LO Shippers Action Comm.*, 4 I.C.C.2d at 13-14, and we see no reason why the Commission should be prevented from giving the market some opportunity to assimilate repair-move costs before entertaining a challenge to the adequacy of mileage allowances under section 11122.

The Commission reasonably determined, moreover, that at least some of the mileage-allowance recovery issues

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[15] To the extent petitioners' argument stems from the notion that the Interstate Commerce Act requires dollar-for-dollar recovery of the car providers' complete costs of ownership, we have adequately addressed it above. *See supra* p. 18.

raised by petitioners, such as the propriety of railroad mileage caps, involve the effectiveness of allowances in enabling car providers to recover costs of ownership *generally*, and do not bear directly or exclusively on repair-move costs. And, the Commission observed that it was presently entertaining caps and allowance questions in other proceedings. Petitioners fail to show why their rights under section 11122 would not be protected in a separate adjudication. We have no legitimate grounds, under these circumstances, to quarrel with the Commission's procedural determination concerning the limited scope of the *Indiana Harbor II* proceeding. "[A]gencies . . . need not deal in one fell swoop with the entire breadth of a novel development; instead, 'reform may address itself to the phase of the problem which seems most acute to the [regulatory] mind.'" *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)).

Petitioners also assert that the Commission arbitrarily neglected to consider those long-term contractual relationships between railroads, car providers, and shippers which were negotiated in reliance on *Indiana Harbor I*. We are told that many car manufacturers lease railcars to shippers who, in turn, "provide" the cars to railroads for the transportation of freight. Under typical agreements, the manufacturer-owner receives a flat-rate lease payment from the lessee while the lessee pockets any mileage allowances paid by railroads;[16] no mention is made in these agreements of empty-repair-move charges, because *Indiana Harbor I* severely restricted the circumstances under which such charges could be assessed by

[16] While mileage allowances, under prevailing practices, are tendered by railroads to manufacturer-owners, petitioners assert that the typical lease agreement requires the owner to credit these allowances to the lessee.

carriers. Superimposing *Indiana Harbor II*'s regime on these arrangements, it is asserted, will require manufacturer-owners to remit empty-repair-move charges to the railroads without any means of recovering these payments from the car lessees. Similarly, petitioners contend that shippers who have negotiated long-term contract rates with carriers, *see* 49 U.S.C. § 10713 (1982) (providing authority for, and regulating, contract rates for rail transportation in lieu of published tariffs), which rates presumably incorporate an offset amount reflecting the shippers' cost of providing railcars but do not currently account for the possibility of shipper-borne empty-repair charges, will be harmed by *Indiana Harbor II*.

The gist of petitioners' objection, it seems to us, is that the Commission's previous policy induced railroads, car providers, and shippers to do business one way, and that these settled business practices cannot be overridden by developments in the Commission's regulatory policies no matter how compelling the statutory justifications. This argument assumes incorrectly, we think, that industry practices may prevent the Commission from implementing even a justified and well-explained departure from previous policy. That is simply not sound administrative law. *See Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 307-08 (1935) ("when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity"); *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1110 (D.C. Cir. 1987); *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944).

Petitioners' last objection to the reasonableness of the Commission's decision is that the ICC neglected to devote sufficient attention to numerous alternative intercarrier schemes—not requiring the reversal of *Indiana Harbor I*— that allegedly would cure intercarrier cost

allocation problems. The Commission failed, we are told, to discuss the option of "intercarrier pooling," under which railroads would pool a percentage of their line-haul freight revenues for distribution among carriers in proportion to their repair-movement burden. Other options, such as intercarrier litigation over "excess" line-haul receipts and more adequate parent contributions of a portion of their line-haul freight revenues to their switching subsidiaries, were allegedly dispensed with by the Commission without adequate consideration or explanation. This " 'artificial narrowing of options,' " according to petitioners, cannot be countenanced. *International Ladies Garment Workers Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983) (quoting *Pillai v. Civil Aeronautics Board*, 485 F.2d 1018, 1027 (D.C. Cir. 1973)); *see State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 46-48.

This is not a case, however, where the Commission labored under a misperception that the policy ultimately selected was "the only available alternative." *Pillai*, 485 F.2d at 1027. The record reveals that the Commission deliberated upon all three "alternatives" advanced by petitioners prior to settling on the option of allowing empty-repair move charges. *See Indiana Harbor II*, 3 I.C.C.2d at 611-13. The "intercarrier litigation" alternative was reasonably viewed as "complex, costly, and impractical" given the extreme difficulty of determining the extent to which a particular "overcompensated" carrier has been enriched at the expense of a complaining switching carrier. *Id.* at 612-13. The "parent-subsidiary contribution" alternative, while it might redress imbalances between certain discrete carriers, was also viewed as ill-suited to the resolution of an industry-wide problem because not all undercompensated switching carriers are owned by overcompensated line-haul carriers. *Id.* at 612. Finally, the record was deemed inconclusive on the question of the viability of intercarrier pooling of line-haul freight revenues; "little was said by the parties about it"

even though the alternative was identified by the Commission in soliciting public comments. *Id.* at 613. The Commission reasonably believed, nevertheless, that permitting carriers to charge for repair moves was simpler than "establish[ing] a second elaborate system of allocating repair-movement responsibility among individual carriers," as "systems are already in place for handling other private car repair and car supply costs." *Id.* at 614.[17] No further consideration of the alternatives proffered by the car providers, in our view, was legally required.

We conclude, therefore, that the Commission's empty-repair-move policy is based both on a permissible construction of the Interstate Commerce Act and on reasoned scrutiny of the legally relevant considerations. The only question that remains is whether or not the Commission could lawfully apply its new controlling principle to the parties before it in *Indiana Harbor II*.

IV.

Petitioners advance two arguments against the lawfulness of "retroactively" sanctioning the repair-move charges filed by the IHB and the BOCT and challenged by shippers in *Indiana Harbor II*. First, they characterize the Commission's action in *Indiana Harbor II* as a rule, which, under the Administrative Procedure Act, may be given prospective effect only. Second, petitioners argue that even if *Indiana Harbor II* is labeled an adjudication, retroactive application of the Commission's new empty-repair-move policy to the parties in this case violated fundamental principles of fairness. We find neither argument persuasive.

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[17] The Association of American Railroads argues that the ICC has no authority to direct carriers to contribute to an intercarrier pool. *See* 49 U.S.C. § 11342 (1982). Since the Commission did not embrace this view, however, we cannot consider the point in testing the Commission's consideration of available alternatives.

We need not dwell at length on petitioners' assertion that *Indiana Harbor II* was a retroactive rulemaking. The former policy largely prohibiting empty-repair-move charges was articulated in an adjudicatory proceeding, and *Indiana Harbor II* itself was an adjudication. It seems to us presumptively reasonable that a controlling principle announced in one adjudication may be modified in a subsequent adjudication, and petitioners offer little to question that presumption here. As we have said before, "[a]djudicatory decisions do not harden into 'rules' which cannot be altered or reversed except by rulemaking simply because they are longstanding." *See Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976). Petitioners conceded at argument that, in selecting a controlling principle to govern the dispute before the Commission in *Indiana Harbor II*, the Commission was at the very least empowered to apply that principle in the future to similarly situated parties. Indeed, basic tenets of administrative law *require* the Commission to apply its rules consistently in adjudicatory proceedings. *See generally Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-09 (1973). That *Indiana Harbor II* established an adjudicatory policy to be applied in the future, as well as to the parties before the Commission, is thus of no moment.

Petitioners point to the Commission's requests for public comments under 5 U.S.C. § 553 and contend that that procedure somehow "converted" *Indiana Harbor II* into an informal rulemaking, *see* 50 Fed. Reg. 10,867 (1985); 49 Fed. Reg. 39,740 (1984), thereby rendering retroactive application of the empty-repair-move policy unlawful. Yet petitioners cite no authority for their theory that an adjudication is converted into a rulemaking solely because an agency solicits and entertains the comments of those who have an interest in prospective application of the principle under study, and we have found none. Certainly, the practice of permitting amicus filings in judi-

cial proceedings has never been thought a basis for equating judicial decisions with legislation. So we reject petitioners' novel contention.

Relying on our opinion in *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972), petitioners argue in the alternative that even if *Indiana Harbor II* is regarded as an adjudication, retroactive application of the new empty-repair policy is contrary to law. Petitioners purport to apply the five-factor balancing test [18] set forth in *Retail, Wholesale* and insist that the statutory interest in applying the new rule to the parties' dispute in *Indiana Harbor II* is outweighed by the inequity involved in disappointing the car providers' reasonable expectations in reliance on longstanding Commission precedent. Of course, as the Supreme Court has observed, every administrative case in which a new or modified controlling principle is announced "has a retroactive effect," and such retroactivity is "not necessarily fatal to its validity." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). And because the Administrative Procedure Act does not countenance agency use of adjudicatory powers to announce rules of prospective effect only, *see NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969) (opinion of Fortas, J.); *id.* at 777 (dissenting opinion of Douglas, J.); *id.* at 780 (dissenting opinion of Harlan, J.), it seems clear that the circum-

[18] Among the considerations that enter into a resolution of the [retroactivity] problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale, 466 F.2d at 390.

stances in which a rule may be announced but not applied in an adjudication are few. In part for this reason, courts have interpreted the *Retail, Wholesale* test to bar retroactive application of a new rule only when such application would work a "manifest injustice." *Clark-Cowlitz Oper. Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc).

We do not find the parties' reliance interest in the *Indiana Harbor I* regime to be so great as to warrant the conclusion that retroactive application of the *Indiana Harbor II* empty-repair policy works a "manifest injustice." Soon after the IHB and the BOCT filed their empty-repair tariffs but prior to their effective date, the parties sought ICC suspension of the tariffs as unlawful, *see* 49 U.S.C. § 10707 (1982) (providing Commission suspension authority); *Southern Ry. Co. v. ICC*, 681 F.2d 29 (1982) (describing suspension power), yet the ICC declined to exercise its interim authority. If this action alone did not suggest to petitioners that *Indiana Harbor I* was being drawn into question, the Commission's 1984 order staying the Review Board's decision that struck down the tariffs removed all doubt about the Commission's inclination. In that order the Commission indicated that the railroads had a "substantial" chance of prevailing in defense of their empty-repair-move tariffs. Thus, for most of the period for which petitioners claim retroactive application of *Indiana Harbor II* is unfair, petitioners have been aware of *Indiana Harbor I*'s vulnerability. The parties' reliance interest in *Indiana Harbor I* must be discounted accordingly.

Turning to the other side of the equation, we (like the Commission) think the statutory interest in having *Indiana Harbor II* apply retroactively is significant in this case. The record before the Commission provided abundant support for its conclusion that the IHB and the BOCT were receiving insufficient compensation through line-haul freight traffic for their handling of empty-repair

movements, a predicament in tension with the Staggers Act's objective of providing carriers an opportunity to earn adequate revenues. Under the circumstances, we believe it was perfectly appropriate for the Commission "to apply the law in effect at the time it render[ed] its decision." *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974).

For the reasons stated, the petitions for review are

Denied.

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No. 88-1388

In The Supreme Court of the United States

October Term, 1988

LO SHIPPERS ACTION COMMITTEE,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Contrary to the contentions of the Government and the railroads, this is a matter which merits Supreme Court review. Neither respondent has disputed the monetary significance of this proceeding nor the importance of the issues to the national transportation community and to the nation as a whole in view of the burgeoning reliance of the nation's railroads on the private car fleet.[1]

In 1966, the Congress legislated a cost-of-ownership car-compensation standard for railroad and private cars alike. That standard grew out of a Congressional determination to alleviate recurrent car shortages which plagued the nation for many years. Pet. 14. The car compensation standard first legislated in 1966 and reinforced in 1976 has not been changed by Congress in the intervening years in any way which would justify the perverse construction of the statute

[1] The two briefs in opposition are referred to, respectively, herein as "Govt. Br." and "RR Br."

by the ICC or the passive acquiescence of the U.S. Court of Appeals for the District of Columbia Circuit in that construction. The attempts by the respondents to demonstrate otherwise are little more than legal sleight-of-hand.

I. WHETHER § 11122(b) REQUIRES COST-BASED ALLOWANCES IS A QUESTION OF SUBSTANTIAL IMPORTANCE MERITING CONSIDERATION BY THIS COURT

A. The Importance Of This Question Is Not Challenged

Whether § 11122(b) requires cost-based allowances or whether it permits market-based allowances in disregard of costs is, if not the most important issue in transportation today, certainly one of the most important. Aside from the obvious monetary impact of the decision on the country's rail shippers and railroads, with its impact on the nation's car supply (Pet. 7-11), the time, effort and money that have been put into litigating this issue testify to its importance.[2] And, as pointed out in LOSAC's supplemental brief, filed May 8, 1989, the erroneous decision below has already been used by the same court as a precedent for imposing on shippers additional millions of dollars for the cost of moving empty private cars to repair facilities, an expense which, for more than 40 years, has been held by the ICC and the courts to be the responsibility of the railroads. The unfair adverse effects of the decision below cannot now be contained or controlled except through a correct construction of the statute by this Court.

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[2] It is now generally recognized by almost all elements of the transportation industry that the car surpluses of the early and middle 80's have ended.

B. This Is Purely A Legal Issue To Be Decided By Application Of The *Chevron* Principles[3]

The thrust of both briefs in opposition is that the ICC's choice of so-called market-based allowances over cost-based allowances was correct on economic grounds and in accord with the general policies of the Staggers Rail Act of 1980.[4] But the issue here is not whether the ICC abused its discretion in so holding. The issue here is simply whether the ICC and the Court below correctly construed § 11122(b).[5] That issue is a purely legal issue, and application of the *Chevron* principles leads to the inescapable conclusion that Congress directly and unambiguously addressed that precise issue in 1966 and decreed that allowances for private cars shall be cost-based. In all the years from 1966 right up to the present, Congress has never varied from that standard. It is not the role of the Courts (nor that of the ICC) "to overturn congressional assumptions embedded into the framework of regulation." *F.P.C. v. Texaco*, 417 U.S. 380, 400 (1971).

Chevron is also particularly important here because of its holding that a reviewing Court may not find an ambiguity in a statute without first consulting its legislative history, which the Court below made no pretense of doing. "If a Court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."

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[3] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[4] Respondents (Govt. Br. 5–6; RR Br. 3) purport to look askance at the rise in rates of compensation which would have occurred if they had been reflective of the costs of ownership. At that time costs of ownership were increasing due to the effect of inflationary interest rates. With the decline in interest rates in the last few years, allowances based on ownership cost would have fallen just as dramatically. The Court should be aware that the cost-of-ownership standard does not result in a rigid allowance structure. On the contrary, the influence of current costs of capital and the effect of the size of the national car fleet on the transportation-use ratio introduce considerable flexibility into the formula. *See Car Service Compensation — Basic Per Diem Charges*, 362 I.C.C. 884, 886 (1980).

[5] All statutory references are to Title 49 U.S.C.

467 U.S. at 843, n. 9. If this Court will so much as look at the words of the statute *as actually enacted by Congress*[6] and at their legislative history, it will be immediately apparent that the "gap" which the Court below purported to find in the statute is non-existent. Pet., App. C, pp. 2–4.

C. Congress Has Never To This Day Departed From The Cost-of-Ownership Car-Compensation Standard It Enacted in 1966

In 1966 Congress legislated a rail car compensation standard to correct widespread car shortages. Pet. 14; *Consolidated Rail Corp. v. United States*, 619 F.2d 988, 922 (3d Cir. 1980). No respondent denies that. Instead, they argue (Govt. Br 9–10; RR Br. 9–10) that Congress' intent in 1966 has been superseded by subsequent legislative events. The railroads go so far as to argue (RR Br. 11) that "Congress' intent in 1966 is irrelevant." To the contrary, Congress' intent when it first enacted a car-compensation standard is highly relevant here in view of the axiomatic principle of statutory construction that the words of a statute must be interpreted in light of the purpose Congress sought to serve.[7] [8]

Congress' revision of the car compensation standard in 1976 was a reaction to continuing car shortages and was a direct attempt to encourage car ownership "through adoption of [car compensation] rates that would more accurately reflect the actual costs of purchasing, owning and maintaining freight cars." *Consolidated Rail Corp. v. United States*,

[6] This point is emphasized because both the ICC's and the Court's decision were based *solely* on the 1978 "revised" version of §11122(b).

[7] *Atchison, T. & S. F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980). *See also United States v. Champlin Refining Co.*, 341 U.S. 290 (1951); *The Pietro Campanella*, 73 F. Supp. 18, 26 (S.D. Tex. 1947); Pet. 13–14.

[8] Moreover, a statute should be construed in a manner which effectuates rather than frustrates the major purpose of the legislative draftsmen. *Porter v. Prudential Insurance Co. of America*, 470 F. Supp. 203, 206 (W.D. Tex. 1979). The Commission has repeatedly recognized that allowances which are below cost of ownership are a "disincentive to the purchase of cars" and, hence, are contrary to the Congressional purpose underlying §11122(b). Pet. 10.

619 F.2d 988, 992 (3rd Cir. 1980).[9] Shortly after passage of the 4-R Act amendments to the car-compensation provision of the Interstate Commerce Act, the Commission commented in an implementation proceeding that "[t]he 4R Act requires per diem rates to fully compensate all cost elements, including current cost of capital."[10] The Commission further recognized, in the same proceeding, that "[t]he revision of basic per diem is designed to remove any disincentives to invest in cars, that may have been built into the old formula through failure to include all cost associated with the ownership of cars."[11] And in a further decision in the same case, 362 I.C.C. at 884, the ICC specifically recognized that the purpose of Congress in amending § 1(14)(a) in 1976 was "to require that car service compensation be based upon the ownership expense of freight cars by type of car."

In 1980, Congress considered but rejected proposals to institute a market-based car-compensation regime. Pet. 19–22. The central significance of that is that the law of car compensation did not change in 1980. Clearly, in retaining the cost-of-ownership standard without change, Congress cannot

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[9] The railroads' attempt (RR Br. 8) to use the *Conrail* case as support for market-based allowances at the expense of cost-based allowances is a gross distortion of what that case stands for. The holding in that case was a strong affirmation of the need for car compensation to be based on current costs associated with car ownership. That the court therein stated (at 996) that the non-cost factors enunciated in section 11122(b) must also be taken into account did little more than state the obvious and in no way detracts from the need for such factors to be considered in the context of a cost-of-ownership framework. In 1980, the Commission went to great pains to show how the non-cost factors enumerated in the statute should be analyzed and decided in the context of the cost-of-ownership compensation standard, and, of even greater significance, the Commission explicitly stated that those non-cost factors were not to be considered in determining "basic car-hire",but only in deciding whether to increase basic car-hire to create an incentive for the purchase of car types found to be in inadequate supply. *See Car Service Compensation — Basic Per Diem Charges*, 362 I.C.C. 884, 886–87 (1980). See also note 13 below.

[10] *Car Service Compensation — Basic Per Diem Charges*, 358 I.C.C. 716, 738 (1977).

[11] Id.

be presumed to have added new meaning to old language,[12] particularly when the new meaning is something that Congress considered but expressly rejected.[13] The respondents seek to impart new and different meaning (hence, the railroads' allegation (RR Br. 11) of the irrelevancy of the intent of Congress in 1966 when it first enacted a car-compensation standard) to the car-compensation standard by virtue of a conference committee report that contains some language that supposedly supports market-based car compensation. Govt, Br. 10; RR Br. 10. Even if that report could be said to be part of the legislative history of provisions enacted 14 years previously and last amended four years previously, and even if it correctly represented the views of the Conference Committee on the Staggers Act, which it clearly did not, committee reports are not the law and cannot be interpreted to change the meaning clearly expressed in the statute itself. Furthermore it is neither the function nor the prerogative of a committee of the 1980 Congress to attempt to "interpret" the laws enacted by earlier Congresses. ". . .[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960); *Consumer Product Safety Com'n. v. GTE Sylvania*, 447 U.S. 102, 117 (1980). And certainly the 1980 Congress cannot "amend" the intent which the

[12] *Catano v. Local Board No. 94 Selective Service System*, 298 F. Supp. 1183 (E. D. Pa. 1969).

[13] Most of the numerous so-called "decisions" of the ICC since 1980 on which the ICC and the railroads rely (Govt. Br. 5, n.1; RR Br. 10, n.18) are bootstrap arguments. Most of those "decisions" were simply notices or advance notices of proposed rulemaking. And in none of the cited "decisions" was the issue here involved litigated. *Brae Corp. v. United States*, 740 F. 2d 1023 (D.C. Cir., 1984) (Govt. Br. 11; RR Br. 8, n. 15) supports LOSAC, not respondents. In *Brae*, the Court held (p. 1059) that the ICC's discretionary powers "do not allow the Commission to evade the explicit requirements of section 11122, requirements that directly address the car hire issue and that reflect a specific set of Congressional concerns." LOSAC has never argued that the second sentence of section 11122(b) should *not* be considered in construing the statute. But it clearly cannot be given effect to the end that the cost-of-ownership standard is nullified. The non-cost factors assume meaning only in the context of the cost-of-ownership framework. *See Car Service Compensation — Basic Per Diem*, 362 I.C.C. 884, 886–887 (1980).

1966 and 1976 Congresses had in enacting the cost-based standard.

In addition, this particular report is apocryphal and the circumstances of its birth make it highly suspect. The conference on this long and complex bill lasted only nineteen minutes. Only eight of the sixteen members of the committee were present. The conferees never met as a body, but they agreed in advance to give the staff a blank check to write the report. The Chairmen of the House and Senate committees later agreed on the language, which was not made available in writing to the conferees themselves. The committee did not participate in drafting the report and did not know what was in it until shortly before it was published. 126 Cong. Rec. H9752, daily ed. Sept. 25, 1980; 126 Cong. Rec. H10081, Sept. 30, 1980; R. Eckhardt *Market Dominance in the Staggers Act*, 48 I.C.C. Prac. J. 684 (Sept./Oct. 1981). Such a report can carry no weight when pitted against the pages and pages of the true legislative history of § 11122(b).

Neither brief makes the slightest attempt to meet LOSAC's arguments that the Court must look at the 1966 enactment and the 1976 amendment (the "replaced" statute) and their legislative history, which both clearly show that Congress has directly and unambiguously decreed that allowances for private cars shall be based on costs of ownership. The Government brief never even mentions this crucial issue. The railroads argue that the statute does not require that the shippers are "invariably" entitled to recover the "full" or "complete" costs of ownership, but they never say what costs they think shippers *are* entitled to recover under § 11122(b).[14] In fact the ICC and the railroads have *never* said what they think the first sentence of § 11122(b) *does* mean.

LOSAC's position is that shippers are entitled to receive whatever compensation § 11122(b) says they are entitled to receive and it is for this Court to say what "determined by

[14] If their n. 11, p. 5 is intended to deal with the issue, it is certainly cryptic. Do they admit allowances should be based on all costs except a return? If so, that is answered by § 11122(b) itself which directs inclusion of current costs of capital as one of the elements of cost. *Car Service Compensation — Basic Per Diem Charges*, 358 I.C.C. 716, 735 (1977).

the expense of owning and maintaining" private cars means. Whatever it means, it cannot just be ignored on the theory that the second sentence of § 11122(b) nullifies and eviscerates the first.[15]

Once the meaning of § 11122(b) is determined, it is obviously the duty of the ICC to adjudicate the lawfulness of the assailed allowances under that test. *General American T. Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940) (Govt. Br. 11; RR Br. 9) clearly stands for the proposition that, upon appropriate request, the ICC is to require a railroad to publish and "make effective" the "reasonable allowance" to which a shipper is entitled, from which it follows that if the published allowance is unreasonable and unlawful, the ICC is to require publication and effectiveness of an allowance that removes that unlawfulness. LOSAC did not get the adjudication to which it was entitled because of the ICC's misconstruction of the statute. The ICC's statement (Pet. App. B, 30–31; see RR Br. 12) that LOSAC did not show the challenged allowances were unlawful "under any standard that takes into account market conditions as they relate to all of the statutory factors" is the result of its misconstruction of the statute. LOSAC clearly demonstrated the unlawfulness of the allowances, giving effect to the factors in the second sentence of § 11122(b) in the manner intended by Congress, i.e., within the cost-of-ownership framework.

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[15] Both the Government and the railroads challenge LOSAC's assertion that the effect of the ICC decision is to "deregulate" allowances (Govt. Br. 11–12; RR Br. 13). But if the ICC has absolute discretion whether or not to regulate allowances with no substantive standard to guide it, and it refuses to apply any standard, that is de facto deregulation. It is no answer to say that in "individual" cases, the ICC will consider the lawfulness of allowances. That is merely a sham to avoid ruling on the challenged allowances. LOSAC had standing to bring this complaint on behalf of its members, and it challenged "individual" allowances of each railroad defendant. Whether allowances are published in a national tariff or an individual tariff does not alter the fact that they are the applicable allowances of individual railroads. And the standards of § 11122(b) are the same whether they are applied in this case or one involving only one shipper and one railroad.

II. SECTION 11122(b) CANNOT POSSIBLY BE IGNORED ON THE THEORY THAT § 11122(a) GIVES THE ICC DISCRETION WHETHER OR NOT TO REGULATE ALLOWANCES.

The question of the proper construction of § 11122(b) cannot be avoided under any theory. If § 11122(b) is correctly construed, the absurdity of arguing that § 11122(b) may be ignored because, under § 11122(a) the ICC has "discretion" to enforce or not enforce that standard as it sees fit, is so obvious that it requires no comment. On the other hand, if § 11122(b) does not require adherence to some cost-based standard, an inquiry into whether the ICC has authority to regulate or not regulate allowances is an exercise in futility. The decision on § 11122(a) necessarily has to follow rather than precede the construction of § 11122(b). Had it actually been the first issue decided there would have been no occasion even to consider the meaning of § 11122(b), as the railroads note (RR Br. 2, n. 2).

The proposition that § 11122(b) may be ignored because § 11122(a) gives the ICC discretion not to regulate allowances is so lacking in merit that it is difficult to believe that the Government and the railroads could seriously argue it or that a Court of Appeals could seriously consider it.[16] In any event, the simple answer to that argument is found in the ICC's own words, in an order served November 19,

[16] The argument rests *solely* on the absence of the word "shall" in § 11122(a). If this fact had any significance, it was cured by § 212 of the Railroad Revitalization and Regulatory Reform Act, which neither brief mentions, which, in addition to amending § 1(14)(a), also provided, 90 Stat. 47:

> (b) The Commission *shall*, within 18 months after the date of enactment of this Act, revise its rules, regulations, and practices with respect to car service, in accordance with the amendment made by subsection (a) of this section. (Emphasis added)

The ICC responded to this mandate as to railroad-owned cars but has not done so for privately owned cars. *Car Service Compensation — Basic Per Diem Charges*, 358 I.C.C. 716 (1977); 359 I.C.C. 138 (1978); 362 I.C.C. 884 (1980). The attention of this Court is especially invited to these cases both because the ICC specifically notes that in 1976 Congress amended § 1(14)(a) "to require that car service compensation be based upon the ownership expense of freight cars by type of car" and because the ICC also specifically notes how the factors in the second sentence of § 11122(b) are to be construed *within the cost-of-ownership framework*.

1987, in Ex Parte No. 328, *Investigation of Tank Car Allowance System — Petition For Clarification or Reconsideration*, pp. 2–3, where the ICC said:[17]

> The railroads' position reflects a misunderstanding of the nature of section 11122. They are correct that, under section 11122(a), the Commission's authority to prescribe car compensation is discretionary. *See LOSAC, supra,* at page 8. However, section 11122(b), which contains the standards governing car compensation, provides that car compensation "*shall* be determined" by the factors enumerated in that section. It is thus clearly mandatory, and by its terms governs all mileage allowance tariffs regardless of whether or not they were prescribed by the Commission under section 11122(a). There is no support in the statute, its legislative history, or applicable case law for the view that we may apply section 11122 standards to some cases and ignore them in others. (ICC italics)

CONCLUSION

Whether § 11122(b) requires cost-based allowances for private cars is a question of great importance to shippers and railroads alike. Considering the superficial and desultory treatment of this issue by the Court below, particularly its failure to consider the statute actually enacted by Congress and its legislative history and its failure to fairly consider and meet LOSAC's arguments, this Court should grant the petition for a writ of certiorari to review the judgment below.

Respectfully submitted,

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[17] Copies of this unpublished decision have been lodged with the Court.